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# REPORTS OF CASES

DETERMINED IN THE

# APPELLATE COURTS

OF ILLINOIS

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WITH A DIRECTORY OF THE JUDICIARY OF THE STATE,  
CORRECTED TO MAY 18, 1908.

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VOL. CXXXXIV  
A. D. 1908.

LAST FILING DATES OF REPORTED CASES:  
FIRST DISTRICT, JUNE 14, 1907;  
THIRD DISTRICT, JUNE 22, 1907.

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EDITED BY  
W. CLYDE JONES AND KEENE H. ADDINGTON,  
AUTHORS OF JONES & ADDINGTON'S SUPPLEMENTS TO  
STARE & CURTIS'S ANNOTATED ILLINOIS STATUTES.

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# DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO MAY 18, 1908.

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The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) County and Probate Courts.

## (1) THE SUPREME COURT.

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The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

### REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

### JUSTICES.

*First District*—ALONZO K. VICKERS.....East St. Louis.

*Second District*—WILLIAM M. FARMER.....Vandalia.

*Third District*—FRANK K. DUNN.....Charleston.

*Fourth District*—GUY C. SCOTT.....Aledo.

*Fifth District*—JOHN P. HAND.....Cambridge.

*Sixth District*—JAMES H. CARTWRIGHT.....Oregon.

*Seventh District*—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Hand is the present Chief Justice.

### CLERK.

CHRISTOPHER MAMER, Springfield.

### LIBRARIAN.

RALPH H. WILKIN, Springfield.

## (2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

## REPORTERS.

**W. CLYDE JONES** and **KEENE H. ADDINGTON**, of the law firm of Jones, Addington & Ames, 184 Monroe street, Chicago.

## FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

**CLERK**—Alfred R. Porter, Ashland Block, Chicago.

**JESSE HOLDOM**, Presiding Justice, Ashland Block, Chicago.

**FRANCIS ADAMS**, Justice, Ashland Block, Chicago.

**EDWARD O. BROWN**, Justice, Ashland Block, Chicago.

## BRANCH APPELLATE COURT.\*

## FIRST DISTRICT.

**FRANK BAKER**, Presiding Justice, Ashland Block, Chicago.

**HENRY V. FREEMAN**, Justice, Ashland Block, Chicago.

**FREDERICK A. SMITH**, Justice, Ashland Block, Chicago.

## APPELLATE COURTS—(CONTINUED.)

## SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, LaSalle, Lee, Livingston, Marshall, McHenry, Meroe, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

**CLERK**—Christopher C. Duffy, Ottawa.

**GEORGE W. THOMPSON**, Presiding Justice, Galesburg.

**DORRANCE DIBELL**, Justice, Joliet.

**HENRY B. WILLIS**, Justice, Elgin.

## THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

**CLERK**—W. C. Hippard, Springfield.

**LESLIE D. PUTERAUGH**, Presiding Justice, Peoria.

**JAMES S. BAUME**, Justice, Galena.

**FRANK D. RAMSAY**, Justice, Morrison.

\* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1857. Hurd's Statutes, 1897, 508. Laws of 1897, 125.

## CIRCUIT COURTS.

v

### FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Albert C. Millspaugh, Mount Vernon.

HARRY HIGBEE, Presiding Justice, Pittsfield.  
JAMES A. CREIGHTON, Justice, Springfield.  
COLOSTIN D. MYERS, Justice, Bloomington.

### (3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows:\*

*First Circuit.*—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

#### JUDGES.

A. W. LEWIS, Harrisburg.  
WARREN W. DUNCAN, Marion.  
WILLIAM N. BUTLER, Cairo.

*Second Circuit.*—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

#### JUDGES.

ENOCH E. NEWLIN, Robinson.  
PRINCE A. PEARCE, Carmi.  
JACOB R. CREIGHTON, Fairfield.

*Third Circuit.*—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

#### JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville.  
ROBERT D. W. HOLDER, Belleville.  
CHARLES T. MOORE, Nashville.

*Fourth Circuit.*—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

#### JUDGES.

ALBERT M. ROSE, Louisville.  
TRUMAN E. AMES, Shelbyville.  
SAMUEL L. DWIGHT, Centralia.

*Fifth Circuit.*—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

#### JUDGES.

JAMES W. CRAIG, Mattoon.  
E. R. E. KIMBROUGH, Danville.  
MORTON W. THOMPSON, Danville.

*Sixth Circuit.*—The counties of Champaign, Douglas, Moultrie, Macou, DeWitt and Piatt.

#### JUDGES.

WILLIAM G. COCHRAN, Sullivan.  
SOLON PHILBRICK, Champaign.  
WILLIAM C. JOHNS, Decatur.

## CIRCUIT COURTS.

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*Seventh Circuit.*—The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.  
ROBERT B. SHIRLEY, Carlinville.  
OWEN P. THOMPSON, Jacksonville.

*Eighth Circuit.*—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

HARRY HIGBEE, Pittsfield.  
ALBERT AKERS, Quincy.  
GUY R. WILLIAMS, Havana.

*Ninth Circuit.*—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

GEORGE W. THOMPSON, Galesburg.  
JOHN A. GRAY, Canton.  
ROBERT J. GRIER, Monmouth.

*Tenth Circuit.*—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.  
THEODORE N. GREEN, Pekin.  
NICHOLAS E. WORTHINGTON, Peoria.

*Eleventh Circuit.*—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.  
GEORGE W. PATTON, Pontiac.  
THOMAS M. HARRIS, Lincoln.

*Twelfth Circuit.*—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.  
ALBERT O. MARSHALL, Joliet.  
FRANK L. HOOPER, Waukeka.

*Thirteenth Circuit.*—The counties of Bureau, LaSalle and Grundy.

JUDGES.

SAMUEL C. STOUGH, Morris.  
RICHARD M. SKINNER, Princeton.  
EDGAR ELDREDGE, Ottawa.

*Fourteenth Circuit.*—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

WILLIAM H. GEST, Rock Island.  
FRANK D. RAMSEY, Morrison.  
EMERY C. GRAVES, Genesee.

*Fifteenth Circuit.*—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

RICHARD S. FARRAND, Dixon.  
JAMES S. BAUME, Galena.  
OSCAR E. HEARD, Freeport.

*Sixteenth Circuit.*—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.  
DUANE J. CARNES, Sycamore.  
LINUS C. RUTH, Hinsdale.

*Seventeenth Circuit.*—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

ARTHUR H. FROST, Rockford.  
CHARLES H. DONNELLY, Woodstock.  
ROBERT W. WRIGHT, Belvidere.

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## (4) COURTS OF COOK COUNTY.

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The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex officio*, of the Criminal Court.

### CIRCUIT COURT.

CLERK—Joseph E. Bidwill, Jr., County Building, Chicago.

JUDGES.

GEORGE A. CARPENTER,  
RICHARD S. TUTHILL,  
RICHARD W. CLIFFORD,  
FRANK BAKER,  
FRANCIS ADAMS,  
THOMAS G. WINDERS,  
MERRITT W. PINCKNEY,

JOHN GIBBONS,  
EDWARD O. BROWN,  
LOCKWOOD HONORE,  
GEORGE KERSTEN,  
JULIAN W. MACK,  
FREDERICK A. SMITH,  
CHARLES M. WALKER.

### SUPERIOR COURT.

CLERK—Charles W. Vail, County Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY  
BEN M. SMITH,  
THEODORE BRENTANO,  
GEORGE A. DUPUY,  
ALBERT C. BARNEs,  
ARTHUR H. CHETLAIN,

HENRY V. FREEMAN,  
FARLIN Q. BALL,  
AXEL CHYTRAUS,  
JESSE HOLDOM,  
MARCUS A. KAVANAGH,  
WILLARD M. MC EWEN.

## (5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Hercules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill. 497.)

## THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge. FRANCIS BRANDEWIEDE, Clerk.

## THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge. FRANK W. GREENAWAY, Clerk.

## THE CITY COURT OF CANTON.

P. W. GALLAGHER, Judge. W. S. GLEASON, Clerk.

## THE CITY COURT OF CHICAGO HEIGHTS.

HOMER ABBOTT, Judge. EDWARD H. KIRGIS, Clerk.

## THE CITY COURT OF EAST ST. LOUIS.

W. J. N. MOYERS, Judge. THOMAS J. HEALY, Clerk.

## THE CITY COURT OF ELGIN.

EDWARD M. MANGAN, Judge. CHARLES S. MOTE, Clerk.

## THE CITY COURT OF LITCHFIELD.

PAUL McWILLIAMS, Judge. HARRY L. BALLARD, Clerk.

## THE CITY COURT OF MATTOON.

HORACE S. CLARK, Judge. THOMAS M. LYTTLE, Clerk.

## THE CITY COURT OF PANA.

JOSIAH P. HODGE, Judge. JOSEPH R. BABOOCK, Clerk.

## THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

## MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158).

## CHIEF JUSTICE.

HARRY OLSON.

## ASSOCIATE JUDGES.

FREEMAN K. BLAKE	JOHN W. HOUSTON	HENRY C. BEITLER
WILLIAM W. MAXWELL	JOHN H. HUME	FRANK P. SADLER
JUDSON F. GOING	JOHN R. NEWCOMER	MAX EBERRHARDT
WILLIAM N. GEMMILL	MCKENZIE CLELAND	THOMAS B. LANTRY
WILLIAM N. COTTRILL	JOHN C. SCOVILLE	FREDERICK L. FAKE, JR.
EDWIN K. WALKER	STEPHEN A. FOSTER	ADELOR J. PETIT
EDWARD A. DICKER	FRANK CROWE	CHARLES N. GOODNOW
ISIDORE H. HIMES	MANCHA BRUGGEMEY-	OSCAR M. TORRISON
ARNOLD HEAP	ER	HOSEA W. WELLS
	MICHAEL F. GIRLEN	

## (6) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, La Salle, Peoria, Sangamon, St. Clair and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.)

JUDGES.	COUNTIES.	COUNTY SEATS.
CHARLES B. McCORMORY.....	Adams.....	Quincy.
WILLIAM S. DEWEY.....	Alexander.....	Cairo.
W. H. DAWDY.....	Bond.....	Greenville.
W. M. C. DE WOLF.....	Boone.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JOE A. DAVIS.....	Bureau.....	Princeton.
F. I. BEAUMILLION.....	Calhoun.....	Hardin.
JOHN D. TURNBAUGH.....	Carroll.....	Mt. Carroll.
DARIUS N. WALKER.....	Cass.....	Virginia.
THOMAS J. ROTH.....	Champaign.....	Urbana.
JAMES H. MORGAN.....	Christian.....	Taylorville.
HERSHEL R. SNAVELY.....	Clark.....	Marshall.
ALSIE N. TOLLIVER.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
T. N. COFER.....	Coles.....	Charleston.
LEWIS RINAKER.....	Cook.....	Chicago.
CHARLES S. CUTTING, Pro. J.	Cook.....	Chicago.
JOHN C. MAXWELL.....	Crawford.....	Robinson.
A. L. RUFFNER.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FRED C. HILL.....	DeWitt.....	Clinton.
W. J. DOLSON.....	Douglas.....	Tuscola.
MAZZINI SLUSHER.....	DuPage.....	Wheaton.
WALTER S. LAMON.....	Edgar.....	Paris.
ISAAC W. LIBBOTSON.....	Edwards.....	Albion.
MICHAEL O'DONNELL.....	Effingham.....	Effingham.
JOHN H. WEBB.....	Fayette.....	Vandalia.
H. H. KERR.....	Ford.....	Paxton.
T. J. MYERS.....	Franklin.....	Benton.
JOHN D. BRECKENRIDGE.....	Fulton.....	Lewistown.
W. S. PHILLIPS.....	Gallatin.....	Shawneetown.
THOMAS HANSHAW.....	Greene.....	Carrollton.
GEORGE W. HUSTON.....	Grundy.....	Morris.
JOHN M. ECKLEY.....	Hamilton.....	McLeansboro.
CHARLES A. JAMES.....	Hancock.....	Carthage.
JOHN H. FERRILL.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
ALBERT E. BERGLAND.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
PAUL WILLIAMS.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
THOMAS F. FERNS.....	Jersey.....	Jerseyville.
WILLIAM RIPPIN.....	Jo Daviess.....	Galena.
WILLIAM A. SPANN.....	Johnson.....	Vienna.
FRANK G. PLAIN.....	Kane.....	Geneva.
DAVID B. SHERWOOD, Pro. J.	Kane.....	Geneva.
ARTHUR W. DESLEM.....	Kankakee.....	Kankakee.
WILLIAM HILL.....	Kendall.....	Yorkville.
R. C. RICE.....	Knox.....	Galesburg.

## COUNTY AND PROBATE COURTS.

JUDGES.	COUNTIES.	COUNTY SEATS.
DEWITT L. JONES.....	Lake.....	Waukegan.
WILLIAM H. HINEBAUGH.....	LaSalle.....	Ottawa.
ALBERT T. LARDIN, Pro. J.....	LaSalle.....	Ottawa.
JASPER A. BENSON.....	Lawrence.....	Lawrenceville.
ROBERT H. SCOTT.....	Lee.....	Dixon.
ULYSSES W. LOUDERBACK.....	Livingston.....	Pontiac.
DONALD McCORMICK.....	Logan.....	Lincoln.
ORPHEUS W. SMITH.....	Macon.....	Decatur.
JOHN B. VAUGHN.....	Macoupin.....	Carlinville.
JOHN E. HILLSKOTTER.....	Madison.....	Edwardsville.
JOHN S. STONECIPHER.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
LANNES P. OAKES.....	Massac.....	Metropolis.
WILLIAM J. FRANKLIN.....	McDonough.....	Macomb.
DAVID T. SMILEY.....	McHenry.....	Woodstock.
ROLLAND A. RUSSELL.....	McLean.....	Bloomington.
GEORGE B. WATKINS.....	Menard.....	Petersburg.
HENRY E. BURGESS.....	Mercer.....	Aledo.
LOUIS ARNS.....	Monroe.....	Waterloo.
JOHN L. DRYER.....	Montgomery.....	Hillsboro.
FRANCIS E. BALDWIN.....	Morgan.....	Jacksonville.
E. D. HUTCHINSON.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
WILBERT I. SLEMMONS.....	Peoria.....	Peoria.
LEANDER O. EAGLETON, Pro. J.	Peoria.....	Peoria.
MARION C. COOK.....	Perry.....	Pinckneyville.
ELIM J. HAWBAKER.....	Platt.....	Monticello.
PAUL F. GEOTE.....	Pike.....	Pittsfield.
WILLIAM A. WHITESIDE.....	Pope.....	Golconda.
LYMAN G. CASTER.....	Pulaski.....	Mound City.
HENRY C. MILLS.....	Putnam.....	Hennepin.
S. LOVEJOY TAYLOR.....	Randolph.....	Chester.
JOHN A. MACNEIL.....	Richland.....	Olney.
ROBT. W. OLTMSTED.....	Rock Island.....	Rock Island.
ALBERT E. SOMERS.....	Saline.....	Harrisburg.
G. W. MURRAY.....	Sangamon.....	Springfield.
CLARENCE A. JONES, Pro. J.	Sangamon.....	Springfield.
WM. H. DIETERICH.....	Schuylerville.....	Rushville.
JAMES CALLANS.....	Scott.....	Winchester.
CALVIN GREEN.....	Shelby.....	Shelbyville.
BRADFORD F. THOMPSON.....	Stark.....	Toulon.
JOHN B. HAY.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ANTHONY J. CLARITY.....	Stephenson.....	Freeport.
JESSE BLACK, JR.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
ISAAC A. LOVE.....	Vermilion.....	Danville.
JOHN A. LOPP.....	Wabash.....	Mt. Carmel.
J. W. CLENDENIN.....	Warren.....	Monmouth.
LEWIS BERNREUTER.....	Washington.....	Nashville.
JOHN R. HOLT.....	Wayne.....	Fairfield.
JULIUS C. KERN.....	White.....	Carmi.
HENRY C. WARD.....	Whiteside.....	Morrison.
GEORGE J. COWING.....	Will.....	Joliet.
JOHN B. FITHIAN, Pro. J.....	Williamson.....	Joliet.
W. F. SLATER.....	Winnebago.....	Marion.
LOUIS M. RECKHOW.....	Rockford.	Rockford.
JOHN F. BOSWORTH.....	Woodford.....	Eureka.

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CASES  
DETERMINED IN THE  
FIRST DISTRICT  
OF THE  
APPELLATE COURTS OF ILLINOIS  
DURING THE YEAR 1907.

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Frederick S. Hebard v. Thomas Tilley.

Gen. No. 18,269.

1. **VERDICT**—when disturbed as against the evidence. A verdict which clearly preponderates in favor of the losing party will be set aside on review.

2. **RECEIVERS, ETC.**—what essential to render, personally liable. Wherever assignees, trustees, receivers, or the like, have been held to a personal responsibility, such responsibility is predicated upon contracts made by them either in their official capacity or contracts which, by legal construction, are held to have the quality of personal responsibility.

Assumpsit. Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1906. Reversed and remanded. Opinion filed May 13, 1907.

ROBERT F. PETTIBONE, for appellant.

CONSIDER H. WILLETT, for appellee; SIDNEY S. GORHAM, HENRY W. WALES and WILLIAM H. DUVAL, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Thomas Tilley, an architect, commenced this suit in assumpsit against Frederick S. Hebard, and filed a

declaration consisting of the common counts, with a bill of particulars attached as follows:

"For services as custodian of building known as 'Open Board of Trade Building,' 18-24 Pacific avenue, Chicago, Illinois:

From Aug. 17, 1899, to Aug., 1900, 365 days and nights, \$5 per day,.....	\$1,825.00
From Aug. 17, 1900, to Aug., 1901, 365 days and nights, \$5 per day,.....	1,825.00
From Aug. 17, 1901, to Aug., 1902, 365 days and nights, \$5 per day,.....	1,825.00
From Aug. 17, 1902, to May 1, 1903, 254 days and nights, \$5 per day,.....	1,275.00
	<hr/>
	\$6,750.00."

The suit proceeded to trial under a plea of *non assumpsit* before the Circuit Court, with a jury, the latter of whom rendered a verdict for \$2,670, upon which the court, after overruling a motion for a new trial, entered judgment.

The points urged in argument for a reversal of this judgment are that the verdict does not do justice between the parties; that it is clearly contrary to the weight of the evidence; error in the rulings of the trial court in the admission and rejection of evidence, and error in the instructions of the court to the jury.

The plaintiff rested his case upon an implied promise to pay for the services he claims to have rendered as custodian. In May, 1897, plaintiff rented an office on the third floor in the Open Board of Trade Building, on La Salle street, Chicago, at a rental of \$25 per month, from one Barclay W. Perkins, receiver under a foreclosure proceeding instituted by the Illinois Trust & Savings Bank of Chicago. In that office plaintiff transacted his business or calling as an architect, in which he had theretofore been engaged for about fifty years. In May, 1899, the Open Board of Trade Building was closed and vacated by all of the tenants but Tilley. He was indebted for unpaid rent,

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and by an agreement with Perkins, he says, he stayed in the building to take care of it until his arrearages of rent were paid. He testifies he had no special arrangement or agreement with Perkins about what his compensation should be, and he admits that he never requested Perkins to pay him anything. On August 16, 1899, Perkins was discharged as receiver, and the premises abandoned by him, and the parties interested in the foreclosure suit in which he was appointed. On the same day Hebard was appointed receiver in a strict foreclosure suit commenced by the Hibernian Bank of Chicago, and in virtue of the authority thus conferred, Hebard went to the Open Board of Trade Building to take possession and found Tilley there. Hebard was accompanied by Grant Carpenter, manager of the renting department of the real estate firm of Wm. A. Bond & Co. These parties went all over the building together, Hebard explaining to Tilley his connection with the property. Tilley testifies that "Hebard made arrangements to have me stop and look after the building," but Hebard and Carpenter say that Tilley is mistaken, that Tilley "said something about continuing there," and that Hebard replied, "That is something I cannot arrange for now." Tilley moved from the third floor room to the southwest corner of the second floor, where he occupied two rooms, in which he not only transacted his business affairs, but lived. He seems to have been his own housekeeper, doing his own cooking, attended by no one, but occasionally visited by congenial cronies, whom he hospitably invited "to take something"—which "something," the record discloses, was of a liquid nature with alcoholic characteristics. Tilley had his business cards, which he gave out occasionally, and did some architectural work, but we judge from the record very little for which he received compensation. About two years and a half after Hebard's appointment Tilley put on the door of one of his rooms this sign: "T. Tilley, Custodian of Building. Rap loud." The admonition to callers to "rap loud" was because of an

infirmity of deafness with which Tilley was afflicted. During Tilley's custodianship much of the plumbing, ironware and fixtures, such as lead pipe, door knobs, various kinds of plates, faucets, marble tops of washstands, etc., were purloined from the building without attracting the attention of Tilley, and it is said that some persons knocked on the door with a hammer, kicked and banged it and rapped on the windows in a vain effort to arouse Tilley. This evidence is claimed to have some bearing on Tilley's claim as circumstances tending to show that he was not acting as custodian, and did not take care of the building, but simply occupied rooms for his own convenience.

During the time covered by Hebard's receivership he gave some directions to Tilley in relation to permitting F. S. Osborne to clean out and occupy a certain portion of the building for sleeping rooms for servants of his hotel, and at another time to store furniture in it. On another occasion Hebard, with Mr. Clarke, the president of the Hibernian Bank, was shown through the building by Tilley. Tilley claims to have had several talks with Hebard in relation to his acting as custodian of the building, but admits that Hebard never agreed to pay him any fixed compensation.

Tilley detailed some conversations with Henry S. Osborne, in which he stated that he went into the building as custodian under an arrangement with Mr. Perkins, acting for the Illinois Trust & Savings Bank. He admitted, however, that he never received any money from Perkins. Plaintiff grounds his right to recover on an implied promise to pay for services as custodian on a *quantum meruit*, and the affirmative proof to sustain such claim is confined to his own testimony. There is no supporting proof. In contradiction to Tilley, Hebard swears that when Tilley talked about continuing there he replied that "That is something I can't arrange for now." That he went to the building but seldom, having employed Carpenter of Wm. A. Bond & Co. to look after it. That at his first

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interview with Tilley, Carpenter was with him. Hebard further testifies that Tilley was an old man and apparently in straightened circumstances, and the Illinois Trust & Savings Bank people told him that the old man had no home and that he had better let him stay in the building, and he did. That Tilley never said anything to him about compensation until a few months before he went out. That he had no interest in the property save as receiver, and so explained to Tilley in his first interview. That he never gave Tilley any orders in relation to the building; never found fault with him for any seeming neglect of care for the building, for the reason he did not consider him an employe. That he regarded him as a poor old man, living there as a comfortable place, and he put in a stove in the winter and sent him a little coal to keep him from freezing to death, because he complained of the cold and said the fireplace did not furnish enough heat.

Henry S. Osborne, a lawyer interested in the building, was often at the building when he did not find Tilley there. He testified that on several occasions he banged hard at the door of Tilley's rooms without securing any response and without seeing Tilley. That at one time when he had gained access to Tilley's rooms, Tilley exhibited some plans of a building and talked about them, and gave his card, on which it was stated Tilley was an architect. Osborne and Tilley discussed the financial straits involving the property, and Osborne told him that the parties interested in the equity had no money with which to pay for plans for remodeling the building, or to remodel it and put it on an income producing basis. On one occasion he employed Tilley to make some sketches and paid him for them. Tilley never informed Osborne that he was custodian or in charge of the building, or that he was entitled to any compensation. That one time Tilley said he was going to Mexico where it was warm, and at another that he would go to Denver.

In conversation with Tilley March 17, 1903, in Osborne's office, where Tilley said he had come at the request of Hebard, being subsequent to the time Tilley made his claim to Hebard for compensation, Tilley said to Osborne, among other things, in the presence of Harper E. Osborne, that when Hebard first saw him at the Open Board of Trade Building he told him that he was not prepared to make any arrangement with him, and that Hebard never had made any arrangement with him or any one else. Harper E. Osborne corroborates Henry S. Osborne as to the statement made by Tilley March 17, 1903. Grant Carpenter corroborates the testimony of Hebard in relation to what was said between him and Tilley at the time he first visited the building after his appointment as receiver, and particularly as to Hebard's telling Tilley that he was not prepared to make any arrangement with him. He also testified negatively that Tilley never made any claim to him for pay.

It is patent from the foregoing that the judgment in this record is contrary to the greater weight of the evidence. The proof, instead of preponderating in favor of plaintiff's claim, entirely overcomes it, and as well said by this court in *I. C. R. R. v. Cunningham*, 102 Ill. App. 206: "The mere fact that a jury have passed upon questions of fact cannot absolve this court from the duty of determining whether or not the verdict is justified by the evidence. That duty by the statute is placed upon this court." And the observations of the court in *Bradley v. Palmer*, 103 Ill. 15, are of equal force here, that "When, as in the case at bar, the record shows that the verdict is against the clear weight and preponderance of the evidence, it will be set aside."

On the crucial question upon which plaintiff's right to recover rests, viz: the claim of his employment by Hebard as custodian of the building, three unimpeached witnesses flatly contradict him. The fact that Tilley was in indigent circumstances and for more than two years and a half made no claim on Hebard for com-

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pensation, is a strong corroborate circumstance sustaining Hebard's insistence that he did not employ Tilley.

There were errors committed by the court in the rulings upon the evidence, particularly in ruling out some of the questions put to the witness Perkins, but in our view of the case, these errors are of no importance and do not materially affect the result. Neither are the objections made to the instructions of the court to the jury of controlling importance, and we therefore refrain from commenting upon them.

We do not regard the question of the personal liability of the defendant, because of the fiduciary capacity in which he was acting, under the evidence in this record, to be involved or necessary to a decision of this case.

It may, however, be stated as an axiomatic proposition, and it so appears in all the cases to which plaintiff's counsel has cited us, that wherever assignees, trustees, receivers, or the like, have been held to a personal responsibility, such responsibility is predicated upon contracts made by them either in their official capacity or contracts which, by legal construction, are held to have the quality of personal responsibility. But how can this contention arise in the case at bar? In the first place, it is admitted that defendant made known to plaintiff his official relation to the property and the capacity in which he was acting. In the second place, plaintiff has failed to establish by the evidence a claim against defendant in any capacity, personal or official.

The judgment of the Circuit Court being contrary to the greater weight of the evidence, it is reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

**Edwin Heslip v. Hjalmar Anderson et al.**

Gen. No. 18,284.

1. JUDGMENT NOTE—*what sufficient execution of.* A sufficient execution of a note and warrant to confess judgment appears where the signature of the maker is attached only to the warrant of attorney at the foot of the same sheet of paper upon which both the note and warrant of attorney were written.

2. INJUNCTION—*when does not lie to restrain enforcement of judgment at law.* A bill does not lie to restrain the enforcement of a judgment at law where the defendant therein either might or could have availed at law of all the matters set up in the bill by way of defense to the judgment.

Bill for injunction. Appeal from the Circuit Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1906. Affirmed. Opinion filed May 13, 1907.

N. A. KAUFMANN, for appellant.

CHARLES R. NAPIER, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal from an order dissolving an injunction and dismissing appellant's bill for want of equity.

The bill as amended sought to enjoin the prosecution of suits on weekly instalments of \$15 each on a debt of \$350. It appears that Anderson sold to Heslip a saloon business in Chicago, as Heslip claims, for \$1,350, but as he avers in his bill, Anderson insists the purchase price was \$1,700. Heslip says he paid the \$1,350 in cash, but avers that Anderson, while not denying receipt of such cash payment, claims that appellant signed in form a judgment note for \$350 for the balance of the purchase price of \$1,700, payable in two months, and is further contending that the note was defectively executed, in that Heslip only signed the warrant of attorney to confess judgment, and did

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not sign the note, although both note and power of attorney are partly printed and written on one side of a single sheet of paper. That by reason of such defective execution an action was not maintainable upon it, and that thereafter Heslip promised Anderson to pay the \$350 in that instrument mentioned in weekly instalments of \$15 each. That several suits were commenced for several instalments, and notwithstanding the defense claimed was made before the justices' judgments were rendered in favor of Anderson, and that other suits for other instalments are threatened and one is pending. Nils J. Hendrickson and Peter F. Bretz are county constables, holding justice court process in the case, and Charles R. Napier is counsel for Anderson. It is prayed that further prosecution of other suits and the collection of the judgments of the justice courts be enjoined, and that the alleged note for \$350 be delivered up and canceled. The injunction as prayed, was granted without notice, and it was afterwards dissolved on the motion of the appellees on the face of the bill, and the bill dismissed.

There seems to be a misapprehension as to the law governing the so-called judgment note in question. It is said that the note was defectively executed because the signature of appellant was not attached to the note proper, but only to the warrant of attorney at the foot of the same sheet of paper upon which both the note and warrant of attorney were written.

The rule of law governing an instrument executed in the same manner precisely as the note and warrant of attorney in question is promulgated in *Packer v. Roberts*, 140 Ill. 9, in which the court say, p. 15: "The note and power of attorney are both written over one signature and must be regarded as one instrument. Such an instrument is to be construed by the same rules which govern the construction and application of written contracts in general."

Whether judgment be entered by confession or suits prosecuted for the \$15 instalments of the alleged \$350 debt, the court in which such suits might be brought

would be vested with ample power and jurisdiction to entertain the defense claimed, as set forth in the bill, and if maintained by the proofs, to relieve appellant from the obligation claimed to exist.

There was no sufficient reason for making application for an injunction without notice. We will assume that upon notice and argument the chancellor, in the first instance, would have denied the injunction for the same reasons he dissolved it when the matter was presented with the deliberation of a hearing from both sides of the controversy.

Where suits growing out of contract right, so claimed between the parties, and where the same right is not assailed by different persons, no right to an injunction exists because the assertion of such rights will involve numerous suits. Chicago Public Stock Ex. v. McClaughry, 148 Ill. 372.

Henderson v. Flanagan, 75 Ill. App. 283, was in some of its features similar to the case at bar, and more particularly in numerous suits being threatened, and the court say, on p. 297: "That a suit has been commenced and sixty more threatened, is not of itself a cause for equitable cognizance. They are all between appellant and appellee." So here, whatever suits are imminent or threatened, they must, on the facts stated in the bill, be between appellant and appellee Hjalmar Anderson.

The bill here shows no ground for the interposition of a court of equity, and, as said in Reilly v. Tolman, 54 Ill. App. 589: "Appellant can make any defense he has to the note in a suit at law, if one should be brought. The note being past due, any assignee thereof will take the same subject to appellant's rights."

The fact that two minor tribunals have heard and considered appellant's defenses, and have decided that they are not well taken, lend no force to appellant's claim, resting thereon, for the interposition of a court of equity, nor furnish, uncontroverted, any foundation for equitable relief.

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Chicago Typo. Union No. 16 v. Barnes & Co.

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The decree of the Circuit Court dissolving the injunction and dismissing the bill as amended for want of equity, is affirmed.

*Affirmed.*

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**Chicago Typographical Union No. 16 v. A. R. Barnes & Company et al.**

Gen. No. 18,040.

1. CONTEMPT—*effect of appeal from injunctional order upon jurisdiction of court to punish for.* A court may punish a violation of an injunctional order notwithstanding such order has been appealed from and the appeal remains undetermined.

2. CONTEMPT—*power of court to impose compensatory fine.* It is within the power of a court of equity to impose a fine to serve as well for punishment as for compensation to the party injured by reason of the violation of the injunction which is made the basis of the contempt proceedings.

3. VOLUNTARY ASSOCIATION—*right to join as defendant.* A voluntary association in equity may be sued as such without the joinder of its individual members where its membership is large.

Injunctional proceeding. Appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1906. Affirmed. Opinion filed May 14, 1907.

**Statement by the Court.** This is an appeal from a decree imposing upon appellant a fine of \$1,000 for contempt of court in violating an injunction by which appellant, its officers and persons acting in combination with them were restrained from obstructing and interfering with appellees in the conduct of their business. The bill of complaint upon which the injunction issued, and the injunction order which the defendants are charged with violating, are set forth at length in the statement preceding the opinion of this court in Chicago Typographical Union et al. v. A. R. Barnes & Co., *post*, p. 20, which was an appeal from the final order making the injunction in contro-

versy permanent. That cause and this were consolidated for hearing and argued together. After the appeal from that final order was perfected complainants in that cause filed a petition charging violations of the injunction. The petition alleges that since the injunction issued appellant and others have maintained a picket system around the plants of the said complainants, in violation of the injunction, have intimidated their employes, threatened them with bodily injury, kept up an organized system of enticing such employes away, and that the president and officials of the appellant union have been in active charge of these violations. A rule to show cause was entered, to which the defendant union and its president filed their answer. Upon the hearing the Superior Court found that the respondents, the Chicago Typographical Union No. 16, Edwin R. Wright and Edward E. Bessette, had, at the time of its entry, knowledge of the order of this court of October 11, 1905, granting a temporary injunction, and also had, at the time of its entry, knowledge of the final decree entered on October 24, 1905, making such injunction permanent, and that said respondents have and each of them has since the entry of said order and decree and prior to December 9, 1905, violated said injunction and decree as charged in said petition. It was found that all of the acts so committed were a direct and wilful violation of said orders and a contempt of the court. Thereupon said Wright was fined \$100 and sentenced to imprisonment for thirty days in the county jail; Bessette was fined \$50 and sentenced to imprisonment for a like period and the union was fined \$1,000. There is a provision in the final order that in default of immediate payment of the fine imposed upon the union, execution "issue in the name of the People for the use of complainants."

Respondents by their answer to the petition deny that they or either of them have directly or indirectly authorized or instigated any acts in violation of the injunction, and they set up the pendency of the appeal

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taken to this court from the final order of injunction, claiming that pending said appeal all "right, power, jurisdiction and control of said Superior Court of Cook county" to enforce the provisions of the final injunction were superseded and suspended. The answer also sets up other matters apparently intended to show that the injunction was improperly issued in the first place.

**WILLIAM H. BARNUM**, for appellant.

**TENNEY, COFFEEN, HARDING & WILKERSON**, for appellees; **HORACE KENT TENNEY** and **JAMES H. WILKERSON**, of counsel.

**MR. PRESIDING JUSTICE FREEMAN** delivered the opinion of the court.

Appellant earnestly contends that "in the absence of any statutory provision to the contrary, a perfected appeal from a decree deprives the court appealed from, during the pendency of such appeal of power or jurisdiction to enter further orders or decrees in the case," including the power to punish for violations of the injunction. In support of this contention the following cited from section 541 of Elliott on Appellate Procedure will serve to show the nature of the claim thus insisted upon. "The overwhelming weight of authority is that an appeal properly perfected removes a case wholly and absolutely from the trial court and places it in the higher tribunal. \* \* \* After the cause leaves the lower court it cannot act upon any question, involved in the appeal." Conceding the accuracy of this statement, it still remains to be determined whether in the case before us the right of the chancery court which granted the injunction to prevent its violation by contempt procedure, is a "question involved in the appeal" from the order granting the injunction.

It appears from the record that an appeal was allowed from the final injunction order which appellant

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is punished for violating, upon an appeal bond "in the sum of one hundred dollars," and it was ordered that perfecting such appeal should not stay the operation of the injunction. Without reference to whether the allowance of the appeal and its prosecution upon such condition instead of by writ of error was in effect a waiver by appellant of the right of objection to the condition so imposed, we cannot assent to the contention that an appeal from an order granting a prohibitory injunction entered by a court of competent jurisdiction as in this case, deprives the court which granted it of all jurisdiction and power to prevent its violation and punish for the contempt until such appeal is finally disposed of. In O'Brien v. The People, 216 Ill. 354-364, it is said that "jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be" (citing cases) and it is further said that where the allegations of a bill give the court jurisdiction to pass upon its sufficiency (p. 365) "whether the court decided correctly or incorrectly could not affect the question of jurisdiction, nor the duty of all persons having notice to obey the order until reversed by a court of competent jurisdiction." In Franklin Union v. The People, 220 Ill. 355-369, it is said: "The principle is of universal force that the order or judgment of a court having jurisdiction is to be obeyed no matter how clearly it may be erroneous." Christensen v. The People, 114 Ill. App. 40-58; Sumner v. Village of Milford, 214 Ill. 388-393. If it is the duty of all persons to obey the order, whether correctly or incorrectly entered, can it be that the court which entered it with jurisdiction so to do has no jurisdiction to enforce such duty and compel obedience to it until it is reversed by a court of competent jurisdiction, notwithstanding an appeal to determine the correctness of the injunction order itself? *In re Debs*, 158 U. S. 564-596, it is said, quoting from Cartwright's case, 114 Mass. 230-238: "The summary power to commit and punish for contempts

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tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land within the meaning of Magna Charta and of the twelfth article of our declaration of rights," \* \* \* (p. 599) "that the proceeding by injunction is of a civil character and may be enforced by proceedings in contempt;" and (p. 595) that "a court without the power to protect itself against the assaults of the lawless or to enforce its orders, judgments or decrees against the recusant parties before it would be a disgrace to the legislation and a stigma upon the age which invented it." We do not understand that an appeal from an injunction order or decree deprived a court of this inherent power to punish for its violation. Though the order should subsequently be reversed, until it is reversed by an appellate tribunal it remains a valid order, just as the lien of a judgment is still a valid lien pending an appeal from the judgment itself. A proceeding for contempt against those violating it is not a proceeding to enforce the injunction itself. An injunction order is effective against all who have notice of it from the time of its entry. It requires no writ of execution to enforce it. There is nothing to be stayed by an appeal from it. Such appeal raises only the question of its propriety, where the court had jurisdiction to enter the order. It is still the "duty of all persons having notice to obey the order until reversed by a court of competent jurisdiction." To compel such obedience is, we think, an exercise of the court's inherent "power to protect itself against the assaults of the lawless," from "contempts tending to obstruct or degrade the administration of justice." In a contempt proceeding the propriety of the order granting the injunction is not a subject of consideration. An appeal from it does not of itself bring before the reviewing court anything that has occurred, any conduct of the parties or acts of the chancery court subsequent to the allowance

of the appeal. L. S. & M. S. Ry. Co. v. C. & W. I. Ry. Co., 100 Ill. 21-34. Without power in that court to protect itself and litigants against disobedience of its prohibitory orders and decrees pending the determination by a reviewing court of their propriety, it is apparent that the whole benefit of an injunction might be lost to the party in whose favor it is granted. A subsequent punishment for the contempt after, by disobedience of an injunction, irremediable harm has been done, and the whole purpose and effect of the injunction defeated, would neither protect the dignity of the court nor the rights of the party injured. By the mere filing of an appeal bond the defendant would be at liberty to proceed at his leisure in disregard of the order and defiance of the court.

It has been said by our Supreme Court that by perfecting an appeal, proceedings under a judgment are superseded (*Ambrose v. Weed*, 11 Ill. 488-491); that "the appeal operates as a *supersedeas* granted on a writ of error, or the order of a circuit judge staying a judgment in the Circuit Court" (*Oakes v. Williams*, 107 Ill. 154-157); that the appeal does not vacate a decree or destroy its lien, it merely suspends the operation of a decree (*Walker v. Doane*, 108 Ill. 236-247). In like manner an appeal does not vacate or destroy the validity and authority of a prohibitive injunction order or decree, nor suspend the duty of obedience to it, however its operation might be affected in other respects if any. The power of a court of equity to issue the writ of injunction is not conferred by express statute. It is one of the extraordinary remedies growing out of the inadequacy of other means to effect its purpose and protect individual and property rights. A prohibitory injunction operates generally to maintain a *status* existing before the acts enjoined threatened or undertaken. Appeals or writs of error have the like effect. They maintain the *status* while they are pending. If the power to punish for contempt in violating an injunction is suspended by an appeal from the injunction order itself, such appeal

would no longer serve to maintain but would destroy the *status*. It would practically dissolve the injunction and its subsequent affirmance by an appellate court would in most cases avail the appellee nothing. In *Green Bay & M. Canal Co. v. Norrie*, 118 Fed. Rep. 923, it was said: “The effect of the *supersedeas* therefore in the present case was not to permit violation of the injunction pending the appeal or to protect the defendant in such violation; for the plaintiff might at any time have instituted proceedings in contempt to the end that the injunction should in the meantime be obeyed.” *Idem*, 128 Fed. Rep. 896, affirms this case. In *High on Injunctions*, 4th ed., 2nd vol., sec. 1431, it is said: “An appeal from a final injunction does not suspend its operation and the doing of the act enjoined may be punished as a contempt notwithstanding such appeal; \* \* \* and the lower court and not the reviewing court is the proper tribunal to entertain such proceeding.” Other references in point are *High on Injns.*, sec. 1698; *Slaughter House cases*, 10 Wall. 273; *Hovey v. McDonald*, 109 U. S. 150-160; 20 Ency. of Pl. & Pr. 1231; *State v. Dillon*, 96 Mo. 62; *Cent. Un. Tel. Co. v. Board of County Commrs.*, 110 Ind. 203; *Wilkinson v. Dunkley Williams Co.*, 104 N. W. Rep. (Mich.) 772. The rule is different as to mandatory injunctions. *High on Injns.*, sec. 1698a.

We are told that appellant cannot be sued in its association name in this or any other court. While appellant Union No. 16 is, it is said, a voluntary organization, it insists upon its right as such to prosecute this appeal, and we are of opinion it is entitled to do so. As said in *Fitzpatrick v. Rutter*, 160 Ill. 283-286: “Its name implied a corporate body. It authenticated its acts by a common seal, exercised corporate powers and it is thus estopped from denying its corporate existence. *U. S. Ex. Co. v. Bedbury*, 34 Ill. 459.” In *Franklin Union v. The People*, 220 Ill. 355-364, a similar objection is said to have been waived when not raised in the trial court. But a voluntary association may, as

an exception to the general rule, be made defendant in equity where its members are very numerous—in this case it is said they number at least 2800—and where those who sue or defend do so for the benefit of the whole and may fairly be presumed to represent the rights and interests of the whole. *Guilfoil v. Arthur*, 158 Ill. 600; *Fitzpatrick v. Rutter*, *supra*. We are of opinion, however, that the petition must be deemed sufficient.

It is urged that there is want of proof of appellant's guilt beyond a reasonable doubt, and that the order imposing penalties was therefore erroneous, that none of the affidavits filed in support of the petition incriminates the appellant Union, but relate to matters *res inter alios*. The affidavits in support of the petition in the present case tend to show disobedience of the injunction by continuance of the conduct complained of in the original bill. In what respect the evidence is insufficient appellant's counsel do not point out. It tends to show wilful violations of the injunction and supports the finding of the chancellor in that regard. Employes of appellees were, according to the affidavits, threatened, abused, assaulted, beaten and otherwise interfered with by members of the appellant Union, as if the injunction restraining such acts had never been issued. There is evidence tending to show that the union, its members and officials, were actively engaged in thus promoting the purposes of the conspiracy.

There is evidence tending to show that damages were inflicted upon appellees in and by the violations of the injunction. The record itself presents indubitable evidence to this effect. "Hence the court in imposing punishment may do so for the benefit of and by way of compensating the injured party. But such compensatory fine is properly limited in amount to the actual damage sustained by the plaintiff." *Encyc. of Pl. & Pr.*, vol. 4, 800. The amount of the fine imposed on appellant is the same as that imposed in *Franklin Union v. The People*, 220 Ill. 355 (see p. 381-2), and cannot be

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deemed excessive. The judgment order directs the amount of the fine to be paid to the clerk of the Superior Court and in default of immediate payment, directs the issue of an execution in the name of the People for the use of complainants, etc. In Franklin Union v. The People, 220 Ill. 355-381, the court did not deem it necessary to decide the question as to the power of the trial court "after the fine is collected to direct the payment of the whole or any part thereof to the complainants in satisfaction of their damages or expenses." In the same case, Franklin Union v. The People, 121 Ill. App. 647-657-8, it is suggested that when the fine is collected the defendant will then have no further interest in it. If paid to the clerk of the court, as the order in this case directs, the final disposition of it will still be open to further action by the court. In Cary Mfg. Co. v. Acme Flexible Clasp Co., 108 Fed. Rep. 873, the judgment directed a payment by the clerk of half the fine to the complainant, and the power to do so is upheld. We are inclined to think the question is not properly before us for determination under the judgment order in the case at bar; since it is only in default of payment to the clerk that the execution in the name of the People for the use of the complainant is to issue. It may never issue.

We have not deemed it necessary to consider at length in this opinion other questions presented in the voluminous briefs filed. Most of the questions arising in the present case are no longer open to discussion since they have been substantially disposed of in O'Brien v. The People, 216 Ill. 354; Franklin Union v. The People, 220 Ill. 355, and the opinions of the Appellate Court in those or similar cases growing out of the same subject-matter. Upon careful consideration of the entire cause and the arguments of counsel, we discover no material error in the record, and the judgment of the Superior Court must therefore be affirmed.

*Affirmed.*

**Chicago Typographical Union No. 16 et al. v. A. R.  
Barnes & Company et al.**

Gen. No. 18,061.

**STRIKE INJUNCTION—when proper.** An attempt to coerce parties to sign an agreement constitutes duress, is illegal, and where sought to be accomplished by conspiracy and combination, violence, threats of violence, etc., may be enjoined in equity.

Injunctional proceeding. Appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1906. Affirmed. Opinion filed May 14, 1907.

**Statement by the Court.** This is an appeal from a final decree of the Superior Court entered October 24, 1905, perpetually enjoining the principal appellant, which is a labor union, its officers and others alleged to be acting with them as follows:

From in any manner interfering with, hindering, obstructing or stopping the business of said complainants, or any of them, or of their agents, servants or employes, in the operation of the business of said complainants, respectively;

From picketing or maintaining at or near the premises of said complainants, or any of them, any picket or pickets;

From assaulting or intimidating by threats or otherwise the employes of any of said complainants, or any person who may become or seek to become employes of said complainants, or either of them;

From congregating about or near the places of business of any of said complainants or about or near any place where their employes are lodged or boarded, for the purpose of compelling, inducing or soliciting the employes of any of said complainants to leave their service or to refuse to work for them, or any of them, or for the purpose of preventing or attempting to prevent any person from freely entering into the service of any of said complainants;

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From interfering with or attempting to hinder complainants, or any of them, in carrying on their business in the usual and ordinary way;

From following the employes of any of said complainants to their homes or other places or calling upon them for the purpose of inducing them to leave the employ of said complainants, or of molesting or intimidating them or their families;

From attempting by bribery, payment or promise of money, offers of transportation or other rewards to induce the employes of any of said complainants to leave their service;

From organizing or maintaining any boycott against said complainants, or any of them;

From attempting to induce customers or other persons to abstain from working for or accepting work from said complainants, or any of them;

From attempting to prevent, by threats or injury, or by threats of calling strikes, any person from accepting work from or doing work for said complainants, or any of them;

From attempting to create or enforce any boycott against any of the employes of the complainants, or any of them, and from attempting to induce people in their neighborhood or elsewhere not to deal with them;

From sending any circular, or other communication to customers, or other persons who might deal or transact business with said complainants, or either of them, for the purpose of dissuading such persons from so doing, and from doing any other act or thing in furtherance of the conspiracy set forth in said bill.

It is claimed in behalf of appellees that appellants had been doing the things enjoined and were threatening to continue to do them “for the purpose of advancing no legitimate trade or business interest of their own, but for the purpose of maliciously inflicting injury upon the business of the complainants.”

It is said by appellants’ counsel that “in a cause of such moment and importance as this \* \* \* every clause, allegation and sentence (of the bill) should be

scanned and scrutinized to ascertain what, if any, facts it alleges and what parts of it are to be rejected as allegations of mere conclusions, inferences, colorings and characterizations of the pleader;" that by this process it will be found that what "upon casual ordinary reading seems to be an allegation of fact is not so in reality," and that "where vital and pivotal facts should and presumably would if they existed have been alleged they are either carelessly or carefully not alleged but only insinuated and left to inference." In reply it is said by appellees' counsel that appellants' "argument evidently proceeds upon the theory that the bill is not to be considered in its entirety, but that each separate clause must contain the elements of a cause of action. It is important, therefore, to get clearly in mind the precise scope of the bill, treating it as a connected whole and giving to it 'the meaning which it fairly conveys to a dispassionate reader by a fairly exact use of English speech.'" In view of these contentions it may be proper to state the material averments of the bill at length as set forth in the abstract. It alleges:

"1. That your orators are, and for some time past have been, members of a voluntary association known as The Chicago Typothetæ, which was organized for the purpose of advancing and improving the printing and binding business in which your orators are severally engaged in the City of Chicago, and also for the purpose of employing skilled mechanics whose services may be required by the members of said association; that each of your orators has been for several years past engaged in the printing business in the City of Chicago and has valuable and well equipped plants, consisting of machinery, tools, supplies, etc., necessary for that purpose, the value of which exceeds, in the case of each one of your orators, many thousand dollars, and that the business of each one of your orators in each year varies from \$50,000.00 to upwards of \$100,000.00. That in the conduct of said business your

orators have each made many contracts for printing, all of which are necessarily for future delivery, in which, if carried to completion, there will be a substantial profit, but in which, if, for any reason, your orators are unable to fulfill them, a serious loss will be entailed, the exact amount of which cannot now be stated, but will aggregate many thousands of dollars. That, in order to successfully prosecute their business, it is necessary that their several plants run substantially without interruption; that the various departments of each plant are necessarily so connected as to be dependent upon each other so that the operation of each is essential to the completion of the work and the proper conduct of the business. That for the purpose of conducting their business, your orators are compelled to employ many skilled mechanics, among others compositors or typesetters, and that these workmen, by association in the course of their employment, become acquainted with the methods and habits of business in each particular shop so that by reason of that familiarity their services are especially valuable, and changing the workmen and employing those unfamiliar with the work beyond what is required by the ordinary exigencies of business, produces confusion and delay in the completion of work, and in many ways causes substantial injury. For this reason complainants have always sought to obtain workmen of high grade of skill and intelligence and it is important for the successful prosecution of their business that they be allowed to freely exercise their right of obtaining such workmen, irrespective of the question whether such workmen belong or do not belong to a labor union.

"2. Your orators further show that the defendant, Typographical Union No. 16, is a labor Union organized and existing in the City of Chicago, whose members are typesetters and compositors; that it is one of the rules and a part of the policy of said Union and its members that its members shall not work with mechanics who do not belong to said Union, but are

what are called non-union men, and that said members shall, at the command and dictation of the union and its officers, strike and leave the employ of an employer who insists upon employing non-union men. A plant or shop in which only union men are employed is, by said Union and in common parlance, called a closed shop, while one in which the employer exercises his right of employing whom he pleases is called an open shop. And it is the rule, principle and policy of said Union and its members to compel employers to abandon their right to maintain an open shop and to submit to the Union's demand that they maintain only a closed shop.

"3. It is also the policy of said Union and its members to adopt certain rules and regulations, both with reference to the length of time which a man shall work at his trade and the amount of wages which he shall receive, and to enforce these rules both by compelling their own members to strike and quit the employment of any one who will not submit to the union rules, and also by certain coercion upon the employer through strikes, interference with his business and workmen and other means so as to compel him to conduct his business in accordance with the rules laid down by the Union. That another means adopted by said Union for the purpose of accomplishing its said purpose is what is called a boycott, by which said Union endeavors, by threats, persuasion and otherwise, to induce and compel people to refuse to do composition and repair work for such an employer, by threatening that any one who does so will have a strike called upon his shop, his men taken out and his business similarly interfered with. That to accomplish this they direct their members in other shops to refuse to do any work brought to such shop from an employer against whom such a strike has been called and, if the work is done, to notify the Union and call a strike against the person so doing it. By which means the Union and its officials and members seek to tie up absolutely the business of any employers with whom they have a dispute so that no

one will deal with him, and he will be wholly prevented from transacting his business and be so greatly injured that he will, as a means of relief, accede to their demands. That among other methods which are adopted by the Union for the purpose of compelling an employer to submit to the Union's demands and of compelling him to conduct his business in accordance with their wishes, they adopt what is called the picket system, by which there is maintained about the plant of a shop where a strike is in progress a sufficient force of pickets to watch the employees going to and from their work, interfere with them in so doing, endeavor by threats both open and implied, by force and intimidation to prevent them from continuing in their employment, and to induce them to leave their employer for the purpose of inflicting injury upon him by interrupting and interfering with his business. That the Union and its officers and members also, as a means of accomplishing the same result, offer money and other inducements to men thus employed, for the purpose of bribing them to leave their employment, in some cases offering them definite sums of money and in other cases paying their transportation to leave the city and securing or promising to secure for them work in other cities. That they also endeavor to induce the workmen to join the Union so that the Union may thereby acquire power and authority over them and may compel them to obey its demands with reference to strikes and other matters affecting their employment. That all of this is done for the purpose of injuring the employer who is involved in a dispute with his employees or with the Union and of compelling him by such injury to submit to the terms upon which the Union insists. And your orators charge that all of the acts of the defendants hereinafter set forth and of those conspiring with them to accomplish their ends were in furtherance of this plan and for the purpose of inflicting injury upon your orators.

“4. Your orators further show that said Typographical Union No. 16, in the early summer of 1905,

announced that after January 1, 1906, it would insist that eight hours should constitute a day's work for compositors in the City of Chicago, and that no workman should be allowed to work more than that time nor any employer allowed to employ workmen who worked more than eight hours. That your orators and the said Association known as The Chicago Typothetæ have, on the other hand, insisted upon their right to determine for themselves upon what terms they would contract with their workmen, and upon their right to be left free to contract with workmen upon such terms as would be mutually satisfactory to both parties. For this reason the complainants and said The Chicago Typothetæ have incurred the hostility of said Union and its members, and they have in various ways, as is more particularly hereinafter set forth, combined together to injure said Typothetæ and its members and to prevent them from carrying on its business except in a manner satisfactory to the Union.

"5. Your orators further show that on or about the 5th day of July, 1905, certain of your orators, to-wit: The Faithorn Printing Co., and in August, 1905, R. R. Donnelly & Sons Co., A. R. Barnes & Co., Clinic Publishing Co., employed non-union compositors in their respective offices, and thereupon said Typographical Union No. 16 directed the members of that Union who were working for said complainants to strike and leave their employment because of the presence of said non-union workmen in the shop. That shortly thereafter the officials of said Union called upon other members of your orators and demanded that they agree with said Union and its members that on and after January 1, 1906, they would submit to the demand of the Union for an eight-hour day and would also agree to maintain a closed shop. The complainants so applied to by the Union refused to accede to this demand or to make such agreement, and thereupon the officials of said Union directed all of the union men belonging to said Union in said shops to strike and to quit work,

and said workmen, in obedience to the command of said Union, immediately left the employment of your complainants, and since that time have refused to work for them. That immediately upon the calling of said strike said Union and its said officers and other defendants inaugurated and have since maintained a system of picketing the places of business of said complainants, the pickets being in some instances the workmen who had left the employment of the complainants, and in some cases were other persons hired by the Union for that purpose, or by members of the Union, or who were ordered there by the Union for that purpose. That these pickets have surrounded the respective places of business of the complainants, have maintained a constant watch upon its employes going to and from its business and in many cases intimidated them and endeavored, by threats and in some cases by assaults and open violence, to compel them to leave the employment of the complainants. That in other cases they have endeavored to induce or to compel the employes to leave the service of the complainants by bribes and offers of money, by offering to procure for them work in other places, or by offering and giving them transportation to leave the city, and by these and similar means have induced, and are now constantly trying to induce them to leave the employment of the complainants. That the money necessary for this purpose is furnished by said Union, and that the pickets who thus watch are maintained by and are under the control and direction of the Union and its said officers and the committees appointed by it, for the purpose of continuing said strike. And your orators charge that these and the other methods of interfering with their business herein set forth have been for several weeks continuously carried on by said Union and its officers and members. And your orators present herewith the affidavits of numerous named individuals, and make the same a part of this bill, and offer the same as evidence, showing for greater certainty the details of many acts of such interference by said defendants.

“6. Your orators further allege that by this means said Union and its officers and the other defendants have seriously interfered with the business of each of your orators; that they have taken away from them, by the means above referred to, many of their employes, and have prevented them from obtaining other employes who are willing to work in the places of those who had thus voluntarily left their work. That your orators have on hand many contracts and a large amount of unfinished work which they can complete through the service of men who are willing to work upon terms mutually satisfactory to them and to said complainants, if said defendants are prevented from further carrying out their said plans and are prevented by the injunction of this court from further interference with the business of your orators and with their efforts to carry on said business.

“7. Your orators further show that the said defendants are acting together in pursuance of a common plan to injure your orators and to interfere with their business and to prevent them from carrying on their business as aforesaid, and that they are acting against all of your orators, both jointly and severally, for the purpose of injuring each and all of them and of compelling each and all of them to agree to the terms imposed by said Union and to the condition upon which they are willing to allow their members and other compositors to work as above stated.

“8. Your orators further show and allege that they have no adequate remedy at law for the protection of their interests; that said Union is a voluntary organization and that its members are financially irresponsible so that no adequate judgment for damages against them or any of them could be collected; that the injury to the business of your orators is, and is intended to be, continuous in its effect and to be carried to such an extent as practically to destroy their business, the value of their plants and the capital invested therein, and that your orators are wholly without remedy except by an injunction issued by this court.

“9. Your orators further show that there have been many strikes called, organized and maintained by labor unions in the City of Chicago during the past three years in which similar picket systems have been maintained and in which the unions calling the strikes and others sympathizing with and aiding them have maintained similar picket systems and by said picket systems and otherwise have, by force, intimidation, violence, persuasion and otherwise, interfered with the employers against whom said strikes have been maintained, who in common parlance are called ‘struck houses,’ and have interfered with their employes so that it has become a matter of common knowledge and belief among non-union men and those who are willing to work where strikes are in progress that it is unsafe for them to work for a struck house or to incur the enmity of a union by taking the place of a striker or assisting in any way an employer having a strike to carry on his business, and thereby many men have been intimidated, and all such workmen have just cause for alarm whenever a picket system is maintained, and for believing that injury will result to them in some form if they work or in any way give assistance to a struck house. That this feeling is general and that added force is given to the mere presence of a picket line and to the efforts of the Union and its members in endeavoring to dissuade non-union men from working for such an employer. That this feeling applies to the situation presented by your orators’ case, and by means whereof the efforts of said pickets and of the defendant Union and its members are made effective.

“10. Your orators further show that the defendant Union, in its endeavor to enforce its demand for an eight-hour day and the closed shop, as above stated, presented to the different printing houses in Chicago and compelled or induced many of them to sign agreements to that end, and that it is the purpose of said Typographical Union in calling and maintaining said strikes against your orators and in doing against them the acts herein complained of, to coerce them into mak-

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ing similar agreements with said Union. A copy of which agreement as printed and prepared by the Union is hereto attached, and is as follows:

EDWIN R. WRIGHT,  
President.

[Chicago Typographical  
Union, Organized June  
1852.]

THOMAS P. McCOOEY,  
Vice-President.

'CHICAGO TYPOGRAPHICAL UNION No. 16,  
Room 227 Garden City Block, 56 Fifth Avenue.

JOHN C. HARDING,  
Organizer.

P. O. Box 420.

WILLIAM McEVoy,  
Secy. Treas.  
Telephone Main 3995.

CHICAGO, ILL. Sept. 14, 1905.

'On behalf of and with authority for the firm of....

..... the undersigned hereby agrees to employ none but members of the Chicago Typographical Union, No. 16, in any department of the composing room, or upon any composition, either by hand or machine; or upon any work such as reading proof, making up forms, care of printing material, or upon any other work pertaining to the composing room; and agrees to provide sanitary and healthful workrooms; and further agrees to respect and observe the conditions imposed by the Constitution, By-Laws and Scale of Prices of Chicago Typographical Union No. 16, of current date.

'Beginning January 1, 1906, the eight-hour day shall go into effect.

'No work shall be done for struck shops having difficulty with Typographical Union No. 16.

'Chicago Typographical Union No. 16 agrees to furnish competent union workmen on demand.

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‘This agreement to continue for one year and end October 1, 1906.

..... For the Firm of  
President .....  
.....  
Secretary

Chicago Typographical Union No. 16.’

“That in the furtherance of their said design and to create and maintain a boycott against all printing shops who would not sign said contract and agree to their terms, said Union issued circulars directed to the representatives of the Union working in different shops in the City of Chicago and elsewhere (which representatives are called chapel foremen), as follows:

‘Telephone 3995 Main.

[Chicago Typographical  
Union, Organized June,  
1852.]

‘Office of  
CHICAGO TYPOGRAPHICAL UNION No. 16.  
Garden City Block, 56 Fifth Ave.,  
Room 227.

‘CHICAGO, ILL., August 31, 1905.

To CHAIRMEN OF UNION CHAPELS UNDER THE JURISDICTION OF C. T. U. No. 16:

‘GENTLEMEN: As you are doubtlessly aware, we have strikes on at the following offices (naming 19 offices, mostly of complainants).

‘You are instructed to report immediately any work coming to your office from any of these firms. The Executive Committee has ordered that all work stop on work for strike-bound houses. If chairmen will report such work immediately, an officer of the Union will call and endeavor to adjust such difference.

‘Work done in its entirety (composition, presswork, etc.), or balance of work in union house, and a contract entered into to that effect for a period of time, will be considered satisfactory.

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'By order of the Executive Committee, Chicago  
Typographical Union No. 16.

EDWIN R. WRIGHT,  
President.

JOHN C. HARDING,  
Organizer.'

"11. Your orators further show that the defendants, Fred C. Klein, Hack & Anderson and Sleepeck-Helman Printing Co., who are engaged in the printing business, have been induced by said Union and its officers to sign contracts with said Union similar to that above set forth; that but for that fact they would be willing to do work for your orators, but by reason of their having signed said contracts, they will be induced to refuse to do so by fear that said Union will call a strike against them and enforce a similar boycott—which your orators believe and charge said Union will do. And your orators further charge that said agreements are illegal and void, and ought not to be observed by the parties so making the same, and that said contracts are a part of the conspiracy against your orators, and said Union should not be allowed to enforce them by calling strikes against said Fred C. Klein Co., Hack & Anderson or Sleepeck-Helman Printing Co., and thereby injuring your orators by compelling said parties to refuse to do work for them. That by means of these circulars and similar attempts said defendant Union, its officers and members, have organized, and are now attempting to enforce, a boycott against the complainants and seek to prevent them from having work done by other printing houses or by shops to whom they might apply for work so as to prevent the complainants from carrying on their business except upon condition that they make an agreement similar to that demanded by the Union. In furtherance of this plan and conspiracy said Union publishes weekly what is called a 'directory of union printing offices of Chicago,' containing the names of offices who have been willing to submit to the Union's terms, and

containing also a list of ‘offices on strike,’ in which latter list are published the names of the complainants; and that this directory is widely circulated, for the purpose of showing to all persons the names of the printing offices with whom they can deal with safety, because they have not incurred the ban of union labor, and for the purpose of showing also the names of those who, merely because their men are on strike, are boycotted by the Union, and those whom it can induce to assist it in its said efforts. That said Union and those co-operating with it, as a part of said plan, are also attempting and will continue to attempt to create a boycott against your orators’ employes to induce people in their neighborhood and elsewhere not to deal with them, for the purpose of thereby compelling said employes to leave your orators’ service.

“12. Your orators further allege that among those who, as pickets and otherwise, are assisting said Union and its officers in their said plans and acts against your orators, are the co-defendants, Edward E. Bessette (naming numerous other persons), and that said Bessette is, as your orators are informed and believe, in charge of said pickets and of their operations.

“13. Your orators further show that by those and other means, all of which are directed toward the common end by the defendants and by others assisting them and by said Union in their aforesaid plan, said Union, its officers and the other defendants seek to injure said complainants and to destroy their business as far as possible, for the purpose, through the injury thus created, of compelling them to agree to the Union’s terms and of striving to seduce their employes so as to prevent them from carrying on their business. That said defendants will continue their said efforts unless restrained by the injunction of this court, and that without such injunction the complainants will be without remedy.”

Attached to the bill as exhibits are forty-seven affidavits, the allegations of which are made part of the

bill by express reference thereto. These tend to show that a picket system is maintained about complainants' places of business, that these pickets are endeavoring by offers of money and other means to induce complainants' employes to leave their employment and to leave the city for the purpose of crippling complainants' business, not in legitimate trade competition but maliciously and to inflict wilful injury upon complainants, that these pickets have constantly threatened complainants' employes with physical injury if they continued to work for complainants and have in a number of cases actually assaulted such employes, and that such pickets have almost invariably stated to such employes that their purpose was to break up complainants' business and compel complainants to submit to the demands of the Union, the object being to compel complainants to adopt the eight-hour day and the policy of the closed shop.

A motion to dissolve or modify the injunction was overruled, and thereupon a joint and several demurrer of all defendants to the bill of complaint was filed, assigning as grounds of demurrer:

1st. The granting of the relief prayed for would and will deprive defendants and each of them of liberty and property without due process of law, in violation of article II, sec. 2 of the Constitution of Illinois.

2nd. Would and will deprive defendants and each of them of the right secured to them and each of them by article II, sec. 4 of the Constitution of Illinois, which provides that "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

3rd. Would and will deprive defendants and each of them of the right to assemble in a peaceable manner to consult for the common good, contrary to article II, sec. 17 of the Constitution of Illinois.

4th. Would and will contravene the rights guaranteed to defendants and each of them by article V of Amendments to the Constitution of the United States,

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by depriving them and each of them of liberty and property without due process of law.

5th. Would and will deny to these defendants and each of them the equal protection of the laws and abridge the privileges and immunities of these defendants and each of them as citizens of the United States, in violation of article XIV, sec. 1 of the amendments to the Constitution of the United States.

6th. And would and will reduce these defendants and each of them to a condition of involuntary servitude, in violation of article XIII of sec. 1 of the Constitution of the United States.

The demurrer was overruled and defendants elected to stand by said demurrer.

A final decree for permanent injunction was thereupon entered against all of the defendants, enjoining and restraining them, their agents and servants, etc., as prayed in the bill of complaint, and as enjoined by the order for preliminary injunction.

The defendants and each of them prayed an appeal which was allowed to any or either of them, and it was ordered that the perfecting of such appeal should not stay the operation of the injunction, to which further order defendants excepted.

WILLIAM H. BARNUM, for appellants.

TENNEY, COFFEEN, HARDING & WILKERSON, for appellees; HORACE KENT TENNEY and JAMES H. WILKERSON, of counsel.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

It is first insisted in appellants' behalf that if the final injunction is not reversed as a whole it should be so modified as not to restrain appellants from the exercise of what are claimed to be lawful and constitutional rights; that appellants are, by the injunction, restrained from in any manner interfering with the business of complainants, whether such interference

be lawful or unlawful, peaceful or forcible, malicious or otherwise, even though such interferences be merely that of ordinary competition. We do not so understand the scope of the bill or of the injunction. The former, including the affidavits made a part thereof, describes a combination to injure the complainants by unlawful means. It charges that it was the purpose of the appellant Union by the acts complained of to coerce appellees into making and signing certain agreements, which it is alleged the Union has compelled other printing houses in Chicago to sign through fear of the force, intimidation, violence and kind of persuasion which it is alleged have characterized many strikes called and maintained by labor unions in Chicago during the previous three years. An attempt to coerce appellees to sign an agreement by threats is unlawful. O'Brien v. The People, 216 Ill. 354-373. The agreements as set forth if acquiesced in would compel appellees, among other things, to employ none but members of the appellant Union, to obey the Union's rules as to wages, to allow employes to work only eight hours a day, to do no work "for struck houses having difficulty with Typographical Union No. 16," etc. What ever might be the effect of such an agreement upon appellees' business, it is at least apparent that under it they would surrender its control in important respects. To what extent such surrender would be injurious might depend upon the way in which the Union chose to exercise the power the agreement would confer. Appellees would surrender such control, according to the averments of the bill, to an irresponsible body of men accountable to no one for the way in which they exercise the power they seek to acquire by such agreement. However this may be, no one disputes, so far as we are advised, that appellees have a right to determine for themselves whether it is for the interest of their business to bind it by such an agreement. The scope of the injunction is that it restrains appellants from unlawful interference with appellees' business in pursuance of an alleged conspiracy to compel the

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latter to submit to the Union's demands and become a party to such agreement willingly or unwillingly. It does not purport, as appellants' counsel claim it does, to restrain appellants from entering into legitimate business competition with appellees. There is no pretense in the pleadings or argument in appellants' behalf that the latter have or ever had any plan for such competition which they were endeavoring to put into execution.

We cannot within the limits appropriate undertake to follow appellants' counsel in his analysis of the language of the separate clauses of the bill, and it would serve no useful purpose so to do. The scope and compass of the bill cannot, we think, in this instance be measured in that way. It has been said by the U. S. Supreme Court (*Swift v. United States*, 196 U. S. 375-395) : "A bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme." We are of opinion that the bill before us sets forth with sufficient clearness, fulness and accuracy, facts which tend to show the existence of a combination on the part of appellants to injure appellees' business and make it impossible or at least difficult to carry it on, and that the purpose of the combination was, and its acts pursuant to such purpose were, designed to compel appellees to allow appellants to dictate terms upon which appellees' business might be peacefully conducted. The demurrer admitted the allegations of the bill and also the averments of the affidavits which are by reference expressly embodied as a part of it, and so far as they are well pleaded the facts must be assumed to be correctly stated. There are many things not in themselves unlawful, privileges which all alike may exercise lawfully, but which if done or exercised in pursuance of an unlawful and malicious intent and purpose, it is no infringement of

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the rights of a citizen to restrain. O'Brien v. The People, 216 Ill. 354-365-6; Doremus v. Hennessy, 176 Ill. 608-615. The injunction in this case cannot, however, be fairly construed to restrain appellants from the exercise of a right to "strike," nor from announcing in advance that they intend to strike, as their counsel seems to suppose it does. The injunction restrains appellants "from attempting to prevent by threats of injury or by threats of calling strikes, any person from" doing work for complainants. Such threats to coerce are expressly held to be unlawful in O'Brien v. The People, 216 Ill. 354, on page 373. It is one thing to declare a purpose to strike and quite another thing to use threats of any kind to intimidate others, and in order to injure them or third parties. The language referred to, taken in connection with the general purpose of the injunction as shown by a fair interpretation of its meaning, is not open to the objection urged.

Nor does the injunction seek to interfere, so far as we discover, with the right of the Union to endeavor to maintain in a lawful way its desire for a closed shop or an eight-hour day, nor with the right to strike or to refuse to work for whomsoever its members may choose or for less than a certain scale of wages, nor with the right to exercise any legitimate privilege enjoyed by virtue of the law of the land. All rights, whether called natural or legal, are exercised in a community governed by law subject to the restriction that they must not be so exercised as to interfere with the equal rights of others. It is stated by appellants' counsel "that if the employer wishes to avail himself of union labor which he is under no compulsion to employ, he must take it if at all on terms such as union labor has the right on its side to insist upon," and that "the claim that employers have the right to conduct their business as they please is no more potential than the claim of union workmen that they have the right to conduct their business (which is their labor) on such terms as they please." So far as we are aware this is not and never has been con-

troverted. But it appears from the bill in this case, the allegations of which, as we have said, are admitted by the demurrer, that appellants are and have been endeavoring to place appellees under "compulsion to employ" union labor and solely on its own terms, and that to this end they were using force, intimidation and violence.

It is said in behalf of appellants that Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61; O'Brien v. The People, 216 Ill. 354; Franklin Union v. The People, 220 Ill. 355, are not controlling in this case because it is said the facts alleged in the present bill fall far short of those alleged in the bills in those cases. If by this is meant that the bill in the case at bar does not entitle appellees to the relief sought by injunction we cannot concur. The bill in this case does not differ materially in its nature from the bills in those cases. In all these cases the conditions described are substantially the same, differing only in detail and not in the causes which produce them nor in the methods employed or results which follow. In all alike appear the same purpose to coerce, the lawless and criminal methods used to effect the purpose, the interference with private right and with the public peace and order, such as are described in the bill before us, differing only in degree. In Doremus v. Hennessy, 176 Ill. 608-614, it is said: "It is clear that it is unlawful and actionable for one man from unlawful motives to interfere with another's trade by fraud or misrepresentation or by molesting his customers or those who would be his customers, or by preventing others from working for him or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion with an intent to inflict an injury which causes loss.

\* \* \* Every man has a right under the law as between himself and others to full freedom in disposing of his own labor or capital according to his own will, and anyone who invades that right without lawful cause or justification commits a legal wrong." In Purington

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v. Hinchliff, 219 Ill. 159-166, it is said: "No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business. \* \* \* All parties to a conspiracy to ruin the business of another because of his refusal to do some act against his will or judgment are liable for all overt acts illegally done pursuant to such conspiracy and for the subsequent loss, whether they were active participants or not." That the facts alleged in the present bill do not fall short of those in the cases referred to, unless in degree, is apparent from the language used in *O'Brien v. The People*, *supra*, p. 373. "There can be no doubt that any attempt to coerce the Kellogg Switchboard and Supply Company into signing said agreement by threats to order a strike was unlawful. It was violative of the clear legal right of the company and was unjust and oppressive as to those who did not belong to labor organizations." In *Franklin Union v. The People*, *supra*, p. 378, the same citation is quoted with approval.

We need not follow counsel in the discussion of the effect of a malicious purpose in making unlawful acts which under other circumstances might be lawful, nor cite additional authorities upon that point or to show that the conspiracy charged in the bill was unlawful at common law as well as under the criminal code of this State. That the purpose of appellants and the means adopted to carry it into effect—picketing, such as the bill describes, intimidation, threats, assaults, interference with employes, the boycott so-called—are unlawful and properly subject to restraint by injunction must be deemed settled under the law of this State as announced in cases we have cited. To go over again the same ground covered by the opinions in those cases would serve no useful purpose.

The injunction complained of applies the law correctly to the facts stated in the bill, and we find no error in the decree making it permanent. The decree will therefore be affirmed.

*Affirmed.*

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**John A. Cooke v. The People of the State of Illinois.**

Gen. No. 13,250.

1. BILL OF PARTICULARS—*propriety of reading, to jury.* A state's attorney may properly in his opening argument read to the jury the bill of particulars filed in a criminal prosecution.

2. BILL OF PARTICULARS—*propriety of permitting jury to take, upon retirement.* In a criminal case, upon request of the jury, the court may permit the jury to have the bill of particulars during their deliberations.

3. BOOKS OF ACCOUNT—*when testimony of persons making entries not essential to competency.* Entries contained in the books of account of a bank may be competent without the production of the persons who actually made the entries where the production of such persons is practically impossible.

4. EVIDENCE—*when erroneous admission of, not ground for reversal.* Where a fact has been clearly established by competent unimpeachable evidence, the admission of incompetent, cumulative evidence is harmless and not ground for reversal.

5. INDICTMENT—*function of allegation of "persons unknown."* An allegation in an indictment that the defendant conspired with "persons unknown," is material, but before a fatal variance arises it must appear that the knowledge as to who the co-conspirators were existed with the grand jury at the time of the return of the indictment.

6. CONSPIRACY—*what evidence competent in support of charge of.* The conspiracy being established, everything written or done by either of the conspirators in execution or furtherance of the common purpose is deemed to have been done, said or written by every one of them and may be proved against each.

7. CONSPIRACY—*what does not constitute separate combination.* The entry into a conspiratorial combination of a new participant, the former participants continuing therein, does not create a new combination.

8. CONSPIRACY—*what does not preclude conviction for.* A conviction for a conspiracy will be sustained notwithstanding the proof showed the doing of acts which constituted the commission of a felony.

9. JUROR—*what does not disqualify.* The fact that a juror has a slight opinion based upon what he has read in the newspapers, does not disqualify him where he states that he can decide the case on the law and evidence alone.

Criminal prosecution for conspiracy. Error to the Criminal Court of Cook county; the Hon. BEN M. SMITH, Judge, presiding.

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Heard in the Branch Appellate Court at the October term, 1906.  
Affirmed. Opinion filed May 14, 1907.

**Statement by the Court.** This is an appeal from the Criminal Court of Cook county. Plaintiff in error, hereinafter referred to as the defendant, was indicted at the April term, 1906, of the Criminal Court charged with conspiring "with one Charles H. Bradley and with divers other persons whose names are to the said grand jurors unknown" to obtain money from Cook county by false pretenses, contrary to the statute and contrary to the common law. Motions made in his behalf to quash each count of the indictment were overruled, and having pleaded not guilty he was tried at the July term, 1906, of that court. A jury found him guilty as charged in the indictment, and fixed his punishment at imprisonment in the penitentiary and a fine of \$2,000. Motions for a new trial and in arrest of judgment were overruled and August 15, 1906, he was duly sentenced to the penitentiary until discharged as authorized by law and to pay the fine imposed by the verdict. From that judgment of the Criminal Court he prosecutes this writ of error, which was sued out October 3, 1906.

There is evidence substantially undisputed tending to show that the defendant in error, John A. Cooke, was elected clerk of the Circuit Court of Cook county, Illinois, November 3, 1896, and on December 7th of that year he duly qualified as such clerk and entered upon his duties and continued to act as clerk of that court until December 5, 1904—a period of eight years, having been re-elected in the year 1900.

Charles H. Bradley, who was one of the co-conspirators named in the indictment and one of the principal witnesses for the state, had been appointed chief clerk of the Circuit Court of Cook county in the year 1884 and he continued to occupy that position up to the year 1896, when Cooke re-appointed him chief clerk, and Bradley continued as such chief clerk until June 30, 1904, after which time he held the position of deputy.

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clerk throughout the remainder of Cooke's term. John E. Seinwerth, also a witness for the state, had been for many years prior to July 1, 1904, a deputy clerk in the office of the clerk of the Circuit Court, and on that date he succeeded Bradley as chief clerk, a position he continued to hold until the expiration of Cooke's term—December 5, 1904.

Charles H. Bradley testified that shortly after defendant assumed the duties of clerk of the Circuit Court, some time in the early part of the year 1897, he had a conversation with him, in which Cooke said: "I understand that this office is worth from \$10,000 to \$15,000 a year, and I do not think I am getting as much out of the office as I think I ought to have." Bradley replied: "Whoever gave you that information did not know what they were talking about. I will try to get what I can for you out of the office, but you cannot expect me to do anything that will be liable to get us into trouble." The annual salary of the clerk of the Circuit Court during both of Cooke's terms was \$5,000. In the latter part of the year 1898, Bradley had another conversation with Cooke in which they talked over the question of putting extra clerks on the pay roll, and Bradley asked Cooke to furnish him with a list of names. Cooke answered, "Oh! use any names," and Bradley then asked Cooke if these persons would do any work in the office and Cooke said "No." Bradley then said that he thought the men ought to be put to work, so that if any question came up they could produce the men, but Cooke said that he was willing to take his chances. A list was then made up containing fourteen names which Bradley got out of the city directory. This list, containing the names of fourteen fictitious persons, or at least persons who were not employed in the office of the clerk of the Circuit Court, and who performed no services there, and were entitled to no compensation from Cook county, was copied by Bradley onto the November, 1898, pay roll of the clerk of the Circuit Court, and appears on a

salary receipt book of the year 1898, introduced in evidence, as follows:

**"RECEIPT Book.**

Received the amount set  
opposite our names  
Date of Receipt.

Amount.	Salary For.	
\$104.00	G. Anderson.	
104.00	Phillip Sorber.	
104.00	Albert Windheim.	
104.00	E. M. Felcher.	
104.00	L. D. Bauman.	
104.00	J. J. Smitel.	
104.00	Jacob Bamlow.	
104.00	Jos. Marchette.	
104.00	Frank Sasinski.	
104.00	Carl Doesburg.	
104.00	P. E. Jensen.	
104.00	Harvey E. Hegg.	
104.00	August Ecklund.	
88.00	S. W. Frazier.	

By Charles B. Bradley."

The pay roll was taken by Bradley to the Cook county comptroller's office, where he received fourteen warrants made out for and payable to the order of those fourteen pretended employes, Bradley signing the different names to the pay roll and then writing transversely across the page, "By Charles H. Bradley." Bradley indorsed the names of the payees on the backs of these warrants, making some attempt to disguise the handwriting, and deposited them on December 15, 1898, in the Chicago National Bank to the personal account of John A. Cooke. The warrants were collected by the Chicago National Bank from Cook county on that date and the amount of them, \$1,440, placed to the credit of John A. Cooke's personal account in that bank, thirteen of them being for \$104 each and the other for \$88. These warrants were introduced in evidence by the state. The first one is in words and figures as follows:

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"No. 36,407. STATE OF ILLINOIS. \$104.00.

Treasurer of Cook County.

Payable out of Salary Fund.

Circuit Court Appropriation.

Series 1898.

Court House, First Floor, South End.

Countersigned by

JAMES C. LEWIN,  
President.

CHICAGO, ILL., Dec. 12, 1898.

Will pay Gustav Anderson or order \$104.00, for  
clerk, November salary.

Countersigned and registered.

S. B. RAYMOND, PHILLIP KNOFF,  
Treasurer. Comptroller.

Stamped across the face: S. B. Raymond, County  
Treasurer.

Paid Dec. 16, 1898.

Endorsed on the back: Gustav Anderson; pay to the  
Chicago National Bank or order John A. Cooke, Chi-  
cago National Bank, Paid."

The other thirteen salary vouchers are identical ex-  
cept that the name of the payee is different in each  
one, and except that the last one is for \$88 instead of  
\$104. The endorsement for deposit on each of these  
warrants was made by a rubber stamp, "Pay to the  
Chicago National Bank or order John A. Cooke," the  
word "clerk" being stricken out. This sum of \$1,440,  
being the amount of the fourteen salary vouchers for  
the November salary, 1898, is the first amount as dis-  
closed by the record which the plaintiff in error ap-  
pears to have obtained from Cook county by means  
of false pretenses. From that time until November,  
1904, the record shows that plaintiff in error obtained  
in this way \$22,590.51 by means of so called "stuffed  
pay rolls." One of these pretended employees was a  
West Side park policeman, and another a letter carrier  
in the employ of the United States government.

From November, 1898, until July, 1904, Charles H. Bradley acted as the principal instrument in perpetrating these frauds. From that time until December, 1904, when plaintiff in error went out of office, John E. Seinwerth acted as the principal conspirator associated with him in obtaining this money. Every month during that whole period the names of fictitious persons or persons who had no connection with the office of the circuit clerk, and who performed no services there and who were entitled to no compensation whatever from Cook county, were placed upon the pay roll by Bradley while he was acting as chief clerk and afterward by Seinwerth while he acted as chief clerk, and under the direction of plaintiff in error. Sometimes the names of old clerks who had at one time been employed in the office of clerk of the Circuit Court were used, sometimes the names of real persons who were never in that office, but usually the names were taken by Bradley from the city directory. In one instance plaintiff in error himself wrote out a list of ten names and gave it to Bradley with instructions to place those names on the pay roll for December, 1899, each for \$100. The ten vouchers, aggregating \$1,000, were all collected and the money deposited to John A. Cooke's personal account in the Chicago National Bank February 2, 1900, and the original deposit slip showing that deposit was identified by Bradley and introduced in evidence by the state. The pay rolls for the circuit clerk's office, containing names of real as well as pretended employes, were taken by the chief clerk to the office of the county comptroller, and there the salary vouchers were made out. The actual employes would call and get their salary vouchers and receipt for them. The chief clerk, either Bradley or Seinwerth, would get the vouchers for the fictitious or pretended employes and sign for them. Bradley or Seinwerth then were accustomed to take the vouchers to the county treasurer's office, collect the amounts and give the currency to plaintiff in error who, after counting it would hand it back to Bradley or Seinwerth, with instructions to de-

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posit it to his (Cooke's) personal account in the Chicago National Bank. This was done in every instance while Bradley acted as chief clerk except the first. That was in November, 1898, while Bradley, instead of taking the fourteen vouchers aggregating \$1,440 to the county treasurer's office and getting the currency for them, endorsed on them the names of the payees and deposited them to defendant's personal account in the Chicago National Bank. The evidence shows that in many instances the exact amount of the vouchers was the amount deposited in the Chicago National Bank to the personal account of John A. Cooke on the particular date.

The state introduced in evidence the original deposit slips made out by either Bradley or Seinwerth and given to the Chicago National Bank at the time the deposits were made. Bradley identified these slips as being in his handwriting or in the handwriting of Seinwerth, and the money was traced to defendant's personal account in the Chicago National Bank.

The indictment was returned April 28, 1906, and to escape the statute of limitations it must appear that the conspiracy existed after October 28, 1904. According to the uncontradicted evidence, the pay roll for October, 1904, was made out by Bradley under direction of defendant and delivered to the county comptroller after that date. It contained the names of two persons not employed in the office of the circuit clerk. Vouchers were made out payable to the order of these persons. The money for one of these vouchers is shown to have been taken out of the office drawer and paid to the defendant, and the voucher itself was deposited to the credit of the defendant as clerk November 5, 1904. The pay roll for the month of November is dated November 29, 1904, and contained the names of the same two persons who were not employed in the defendant's office. Vouchers were issued in their names and receipted for by Seinwerth, who had then become chief deputy. The money on one of these was likewise paid to the defendant out of the drawer, and

the voucher deposited in the bank to defendant's official account. The other voucher was handed to the defendant.

So far as appears, neither Bradley nor Seinwerth profited by the conspiracy, receiving only their regular salaries and the defendant being the sole beneficiary.

DANIEL DONAHUE and JAMES HARTNETT, for plaintiff in error.

JOHN J. HEALY, State's Attorney, and HOBART P. YOUNG, for defendant in error.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

That plaintiff in error, hereinafter referred to as the defendant, received and appropriated to his own use money belonging to the county of Cook and that he accomplished this by means of a conspiracy, combination and agreement with Bradley, his chief deputy, and subsequently with Seinwerth when the latter succeeded Bradley as chief deputy, is not, so far as we can discover, seriously disputed. The defendant's attorneys have, however, assigned a long list of alleged errors, some of which are argued at length, and it is contended that the sentence and judgment are contrary to law and should be set aside.

The first of the contentions so urged in defendant's behalf is that the court erred in overruling defendant's motion to quash certain paragraphs of the bill of particulars, in allowing the state's attorney to file an additional bill of particulars, to read these bills in his opening statement to the jury and in sending them to the jury at the request of the latter, while considering their verdict. It is contended that a bill of particulars is no part of the record, its purpose being to advise the defendant of the specific nature of the charges against him, that while such bill may be introduced as an admission against the party furnishing it, it is inadmissible for other purposes, and that the bills were

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“in the nature of hearsay evidence.” We do not concur in these contentions. The bills of particulars were not evidence at all, nor were they so used. To read from them in his opening statement to the jury was probably the shortest and most concise way of stating what the state’s attorney expected to prove in support of the indictment. The original bill of particulars was filed in obedience to a rule on the state’s attorney entered upon motion of the defendant. The additional bill sets out additional names of alleged pretended employes of the defendant as clerk of the Circuit Court and additional amounts which it was alleged the defendant unlawfully obtained and the dates. The motion of defendant for a bill of particulars was in recognition of their purpose as stated in McDonald v. The People, 126 Ill., 150-159, viz.: “to inform the defendant of the nature of the evidence and the particular transactions to be proved under the information, and to limit the evidence to the items or transactions stated in the bill of particulars.” This being the purpose of such bills there was no error in nor was defendant prejudiced by their being read to the jury as a part of the People’s opening statement. It was the jury’s right to have in the outset just the information they contained, that it might know what specific unlawful acts the People proposed to introduce evidence to prove, in support of the indictment, and understand the nature and bearing of the evidence. For the same reason when in considering their verdict the jury asked for the bills of particulars containing a statement of “the items or transactions” relied upon by the People we are unable to discover in what respect the defendant was prejudiced by the Court’s allowing the request any more than by the jury’s having before them the indictment itself. They were entitled to the one as well as to the other. A bill of particulars is “deemed a part of the declaration, plea or notice to which it relates and is construed in the same way as though it had originally been incorporated in it.” Starkweather v.

Kittle, 17 Wen. 21, cited in McDonald v. The People, 126 Ill. 150-160. It has been said to be "an amplification of the declaration." Mayor v. Marrener, 49 Howard's Pract. Rep., 36-39, cited in Sullivan v. People, 108 Ill. App. 326-338. In McDonald v. The People, 126 Ill. 150-161—a criminal case—it was said: "The object of a bill of particulars is to give the accused notice of the specific charge he is required to meet on the trial so that he may be prepared to defend." Under the common law rule in criminal cases, it was within the reasonable discretion of the court to determine what papers introduced in evidence the jury should take with them when they retired to deliberate on their verdict (Bishop on Crim. Proc., 3 Ed., Sec. 9829), and the exercise of such discretion is not error "unless the reviewing court can see that such a course was prejudicial to the defendant and ought not in the exercise of sound discretion and judgment to have been pursued." Dunn v. The People, 172 Ill. 582-588. There was no abuse of discretion in respect to the bills of particulars in the case before us, which were, as we have said, in no sense evidence nor used as such.

It is claimed that the court erred in admitting "hearsay and prejudicial evidence." This contention refers to the introduction of certain entries on the books of the Chicago National Bank in which the defendant kept his personal account. The cashier of that bank, who held that position during all the years of the transaction shown by the evidence, produced and identified the defendant's original deposit slips. These were in the handwriting of Bradley or of Seinwerth, by whom at defendant's direction in the ordinary course of the procedure followed, the fictitious salary vouchers were obtained from the county comptroller, by whom they were indorsed in the names of the payees by whom the money was collected from the county treasurer and by whom it was given to the defendant. The latter, after counting the money, ordinarily handed it with his bank book back to Bradley or to Seinwerth, whichever was chief deputy

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at the time, by whom respectively the deposit slips were made out in defendant's name and the money deposited to defendant's personal account. The various deposit slips were identified by Bradley and Seinwerth, respectively, by whom they were made out. The cashier produced the books of the bank containing entries corresponding apparently to the deposit slips already in evidence, pointed out and identified such entries, and explained the system of keeping the bank books. These entries were not made by the cashier in person, but by bookkeepers and receiving tellers, of whom there were from twenty to twenty-five, several of whom, it appears, have since the closing of the Chicago National Bank gone to various parts of this and other countries and are out of reach as witnesses. It sufficiently appears, we think, that it was practically impossible to produce the persons who had made these entries in the various books of the bank. Under these circumstances we are inclined to agree with what is said in *Continental National Bank v. The First National Bank*, 108 Tenn. 374: "We think it not necessary that the bookkeeper (of a bank) who made the entries should be examined as to their correctness. At the most he could only testify that the entries made by him are true entries of transactions reported to him by others. \* \* \* \* It would seem that the cashier whose function it is to overlook all transactions at the counter and over the books and test each transaction through all its stages would be the person most competent to produce the books and vouch for their accuracy." In *Loewenthal v. McCormick*, 101 Ill. 143-148, the court states that "the books of the bank offered in evidence" showed certain things, and no objection seems to have been made to the introduction of the bankbooks on the grounds urged here. In *Chisholm v. Beaman Machine Co.*, 160 Ill. 101-110, the court said that the books were properly admitted in evidence in connection with proof of certain facts and circumstances and that "their mere admission was not a determination of the weight to

which they were entitled as evidence, and it was the privilege of the appellants to attack their reliability by any legitimate testimony tending to show their incorrectness." The books in the case before us were introduced to show that the amounts of the deposit slips in evidence had passed to the defendant's credit on the books of the bank. For this purpose, when identified as they were, it would seem that the books were the best evidence. At all events, so far as we are advised, there is no attempt to deny that defendant got the money which the original deposit slips and the testimony of those who made the deposits show was deposited to his account. Whether therefore the admission of the books for the purpose stated was or was not objectionable, it was not harmful to defendant. Where a fact is clearly established by unimpeached evidence, the admission of cumulative evidence could have no prejudicial effect and is not ground for reversal. Siebert v. People, 143 Ill. 571-582.

It is further insisted in behalf of defendant that there is a fatal variance between the indictment and the evidence; that the indictment charges defendant with conspiracy with one Charles H. Bradley and with divers persons whose names were unknown to the grand jury, whereas it is claimed that by the bill of particulars and by the evidence it is contended and shown that defendant conspired with Charles H. Bradley, John Seinwerth and others, that John E. Seinwerth was a witness before the grand jury which returned the indictment and told the jury that his name was John E. Seinwerth. It is doubtless true that a defendant has the right to be fully informed of the particular charge made against him, that an averment in the indictment that a person is unknown to the grand jury is material. In Sullivan v. The People, 108 Ill. App. 328-337, it is said that as a general rule the names of persons whom the indicted defendant conspired must be stated when known, that if on the trial it appears from the evidence the person or persons designated as unknown "were known to the grand

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jury when the indictment was found there can be no conviction of such persons," and that it is incompetent on the trial to prove as against the defendants the acts and declarations of a person not named in the indictment or referred to therein as unknown. Whether, as is insisted in behalf of the People, the views thus stated are in conflict with the weight of authority, we need not inquire. The testimony given by Seinwerth before the grand jury is not found in this record. Whether or not, therefore, his testimony there tended to show that he had a part in the conspiracy, or gave information tending to criminate himself we are not advised. There is no presumption that it did, and there is no evidence before us tending to show that the grand jury knew when the indictment was returned that Seinwerth was one of the members of the conspiracy. It appearing from the evidence that Seinwerth was in fact one of the conspirators and there being no evidence that he was known so to be by the grand jurors when the indictment was returned, he is necessarily among those described therein as "unknown" and there is no variance.

Seinwerth having thus been identified as belonging to the conspiracy "and the conspiracy being established, everything written or done by either of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by every one of them and may be proved against each." Lasher v. Littell, 202 Ill. 551-555. See also Spies v. The People, 122 Ill. 1-240-242-3; Van Eyck v. The People, 178 Ill. 199-200. In Wharton on Criminal Evidence, 9th ed., sec. 700, it is said that it "makes no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not or tried or not with the latter; \* \* \* the principle upon which they are admissible at all being that the act or declaration of one is the act or declaration of all united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted."

We do not concur in defendant's contention that the agreement between the defendant and Seinwerth was a new and separate combination. The evidence shows that Seinwerth became a participant in the original conspiracy, while it was still in full operation. Bradley had not retired from it. He was still aiding the defendant in carrying out his purpose and Seinwerth was merely brought into it as another of the defendant's aids.

It is contended that the Statute of Limitations began to run in this case from the time of the commission of the first overt act in pursuance of the conspiracy by Bradley and the defendant in 1897, without reference to overt acts subsequently committed. Since the writ of error in the case at bar was sued out we have had occasion to consider this question at length in the case of Wallace A. Lowell v. The People, to which reference may be had. 131 Ill. App. 137. The argument made in that case in behalf of the defendant was the same now urged upon our attention in the case at bar. Our conclusion was in part thus stated: "It would seem to be sound common sense, as well as good law in this jurisdiction, that each overt act by which the conspiracy becomes effective should be deemed a renewal of the original conspiracy. \* \* \* To hold otherwise would be not only contrary to the law as stated by our Supreme Court, but would exalt a technical objection in favor of the lawbreaker to the dignity of a substantial and just defense."

It seems to be claimed that the fees of the office of clerk of the Circuit Court belonged to the clerk and that he could not therefore be guilty of a conspiracy to obtain them or any part of them by false pretenses. The language of the statute is a sufficient answer to such contention (R. S. chap. 53, sec. 31) and there was no error in refusing to permit the defendant's attorney to read to the jury the opinion in the case County of Cook v. Healy, 222 Ill. 310. Nor can we concur in the contention that there is a reasonable doubt under the evidence as to the defend-

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ant's guilt, notwithstanding the evidence tending to show a previous good character for honesty.

It is further urged that the defendant was tried by an illegal jury, in that the court overruled defendant's challenges for cause of two of the veniremen, whereupon defendant challenged them peremptorily and they were excused. It is said that having thus erroneously compelled defendant to use two of the peremptory challenges allowed him under the statute, it was error not to allow him to use them against two other veniremen accepted as jurors over his objection, the court ruling that he had then exhausted all the peremptory challenges to which he was entitled by law. We find no error in the action of the court overruling defendant's challenges for cause of the two veniremen who were afterward peremptorily challenged by defendant. These men had slight opinions based upon what they had read in the newspapers, but both stated that they could decide the case on the law and evidence alone. Whether they would have been disqualified as jurors otherwise or not, any such objection to their competency is removed by the statute. (R. S. chap. 78, sec. 14, 3rd proviso.) Wilson v. The People, 94 Ill. 299-306; Smith v. Eames, 3 Scam. 76-81.

It is further urged that there was error in permitting the prosecuting attorney to make irrelevant, improper and prejudicial remarks and arguments to the jury over defendant's objections. It would serve no good purpose to extend this opinion by reviewing the language objected to. We have examined it carefully and it must suffice to say we do not consider the objection well founded. The same must be said as to objections made to certain instructions, some of which are practically disposed of by the views above expressed. The defendant's contention to the effect that some of the evidence introduced tended to prove forgery and that the misdemeanor charged in the indictment should be deemed merged in the felony is not well founded. In Graff v. The People, 208 Ill. 312-320-1, a similar contention is considered and it is said

that where "the conspiracy alleged in the indictment is a misdemeanor and the offense for the commission of which the conspiracy was formed is also a misdemeanor and is completed, it has been uniformly held in this country that there is no merger;" and that "if the indictment be for a conspiracy which is a misdemeanor and the conspiracy comprises the doing of many things and the proof shows that among the overt acts done pursuant to the conspiracy is a felony, it would seem the greater weight of authority is that a conviction may nevertheless be had for the conspiracy."

We are convinced from careful consideration of the record that the defendant has had a fair trial, free from substantial error, and that the verdict of the jury is amply sustained by the evidence. The judgment of the Criminal Court will therefore be affirmed.

*Affirmed.*

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Catherine C. Touhy et al. v. Ezra B. McCagg, Executor,  
et al.

Gen. No. 12,448.

1. WRIT OF ERROR—*in what name should be sued out.* Where one of several defendants to a decree in equity seeks to review the same by writ of error, that defendant should sue out the writ in the names of all of the defendants to the decree, and then summon and sever those plaintiffs in error who refuse to assign errors.

2. WRIT OF ERROR—*what effects severance of parties.* A failure of one defendant in a decree, who is made a defendant in error by another defendant in such decree and served with *scire facias ad audiendum errores*, to appear and assign cross error or join with the plaintiff in error in the prosecution of the writ of error, operates to create a severance and justifies such plaintiff in error in prosecuting the writ of error alone.

3. TRANSCRIPT OF RECORD—*what not proper part of.* A petition for a writ of assistance and an order entered pursuant thereto, are not proper parts of a transcript of record filed upon a writ of error sued out prior to the filing of such petition and the entry of the order thereon.

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4. SOLICITOR'S FEES—*when allowance of, in foreclosure proceeding, improper.* An allowance of a solicitor's fee in a foreclosure proceeding to a law partner of the trustee named in the trust deed sought to be foreclosed, is improper where such trustee would participate in such fee.

Foreclosure proceeding. Error to the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1906. Reversed and remanded. Opinion filed May 14, 1907.

**Statement by the Court.** Ezra B. McCagg, executor of the will of Amanda S. Cook, filed a bill in the Superior Court to foreclose a trust deed in the nature of a mortgage executed by Catherine C. Touhy and Patrick L. Touhy, her husband. Said grantors, John Gebhardt, William G. Jackson, Allen A. Gilbert, Arthur B. Wells, the trustee in said trust deed, and Frederick H. Gade, successor in trust, were made defendants to the bill. Complainant afterwards dismissed as to Gebhardt; Patrick L. Touhy and Allen A. Gilbert were served with summons, failed to appear and were defaulted. Jackson entered his appearance, but failed to answer. Catherine C. Touhy answered the bill, and Wells, trustee, and Gade, successor in trust, joined in an answer. The decree of foreclosure which it is sought to reverse by this writ of error was entered March 18, 1902, on the bill taken as confessed by the defendants Patrick L. Touhy, Jackson and Gilbert, the answer of Catherine C. Touhy and the joint answer of Wells, trustee, and Gade, successor in trust. The decree is the usual decree of foreclosure.

The mortgaged premises were sold by the master to the complainant for the full amount of the decree and costs, and, the defendants failing to redeem, August 6, 1903, a master's deed was executed, conveying said premises to complainant.

July 5, 1905, upon a *praecipe* filed, in which Catherine C. and Patrick L. Touhy are named as plaintiffs in error, and Ezra B. McCagg, executor, etc., and Arthur B. Wells, trustee, as defendants in error, a writ

of error issued and also a writ of *scire facias*, which was served upon said defendants in error.

The transcript of the record filed March 13, 1906, was certified November 11, 1905. From this transcript it appears that July 14, 1905, after the filing of the *praecipe* and the issuing of the writ of error and the *sci. fa.* in this case, Jane Creigh Wells filed in said cause in the Superior Court her petition alleging that the title to said premises had, by sundry conveyances, passed from the complainant to her, and praying for a writ of assistance against the defendant, Catherine C. Touhy, and one S. Rogers Touhy to put petitioner in possession of the premises so conveyed to her. July 18, 1905, an order was made in said cause that a writ of assistance issue in accordance with the prayer of said petition.

Upon the record, Catherine C. and Patrick L. Touhy, as plaintiffs in error, assigned errors, both upon matters contained in the original decree and upon matters contained in the order for a writ of assistance.

April 25, 1906, defendant in error McCagg, executor, etc., filed his motion in writing that the writ of error be dismissed because the plaintiffs in error had failed to make parties thereto, all the parties to the record in the Superior Court. Two days later, plaintiffs in error filed their motion in writing for leave to amend, etc., by adding as "defendants in error Allen A. Gilbert, William G. Jackson and Frederick Gade, successor in trust." By an order entered May 4, 1906, the motion of defendant in error McCagg was denied, leave granted to plaintiffs in error to amend by making said Gilbert, Jackson and Gade, successor in trust, defendants in error, and a *sci. fa.* was ordered to issue for such new defendants in error. On the same day said writ was issued for said new defendants in error and served upon Gilbert and Gade. Later the death of Jackson was suggested on the record.

Defendant in error McCagg, executor, etc., filed a brief November 14, 1906, and therein renewed his motion to dismiss the writ of error.

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WILLIAM R. CHAMBERLAIN, for plaintiffs in error.

JOHN M. BLAKELEY, for defendant in error, Ezra B. McCagg.

MR. JUSTICE BAKER delivered the opinion of the court.

The regular and proper practice in this case was for Catherine C. and Patrick L. Touhy to sue out the writ of error in the names of all the defendants to the bill who were alive when the writ was sued out, and then summon and sever the plaintiffs in error who refused to assign errors. *Wuerzburger v. Wuerzburger*, 221 Ill. 277, and cases there cited.

In *Wormley v. Wormley*, 207 Ill. 411, it was held, that a writ of error sued out by only one of the complainants who names all of his co-complainants and the defendants as defendants in error, will not be dismissed for misjoinder of parties, where the defendants in error are served as defendants in error, or enter their appearance, and fail to assign cross errors or ask to be joined as plaintiffs in error, since such action creates a severance.

It is true that only one of the defendants to the bill was originally made a defendant in error in this case, but section 10 of the Statute of Amendments and Jeofails provides that writs of error may be amended.

By amendment, made by leave of court, the remaining defendants other than the plaintiffs in error and Wells, trustee, were made defendants in error, and with the exception of Jackson, whose death was suggested on the record, were all served as defendants in error.

Under the rule stated in *Wormley v. Wormley*, *supra*, their failure to assign cross error or to unite with the plaintiffs in error in the prosecution of the writ of error, operates to create a severance and justifies the plaintiffs in error in prosecuting the writ of error alone. The motion to dismiss the writ of error will therefore be denied.

The writ of error and *scire facias* were sued out July 5, 1905. Jane Creigh Wells, the grantee through *mesne* conveyances from complainant of said premises, filed in the cause her petition for a writ of assistance July 14, and an order was made July 18, 1905, that such writ issue. Neither said petition nor order has any proper place in the transcript of the record in this cause, and will be stricken therefrom.

The only assignments of error relating to any order or proceeding in the cause, made or had prior to the suing out of the writ of error in this case, which have been argued by counsel for plaintiffs in error, are those which relate to the allowance in the foreclosure decree of \$600 to complainant for the services of his solicitor under the provisions of the trust deed. The same question was presented in the case of Touhy et al. v. McCagg, Executor, etc., 121 Ill. App. 93.

The evidence, the master's report and recommendation, and the provisions of the decree relating to the allowance of solicitors' fees were the same in that case as in this, except that the amount of the decree is much greater in this case than in that, and the allowance for solicitors' fees is \$600 in this case and was \$150 in that case. The question has been again argued by counsel and considered by us. We see no reason to depart from the conclusion reached in that case that it was error to allow solicitors' fees for services rendered by Blakeley, the partner of Wells, the trustee in the trust deed which was foreclosed, when such compensation would go into the partnership funds and Wells receive the same profit therefrom that he would receive if the services had been rendered by the firm of Wells and Blakeley.

The petition of Jane Creigh Wells for a writ of assistance filed July 14, 1905, the several affidavits filed in support of and in opposition to said petition; the order of the Superior Court entered July 18, 1905, directing that such writ of assistance issue; the writ of assistance issued pursuant to said order, and the

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return of the sheriff of Cook county thereon will be stricken from the transcript of the record herein.

So much of the decree as allows to complainant \$600 for solicitors' fees will be reversed; in all other respects the decree will be affirmed and the cause will be remanded to the Superior Court, with directions to deny any allowance of solicitors' fees.

*Reversed and remanded with directions.*

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### Chicago Union Traction Company v. Jennie S. Myers.

Gen. No. 12.815.

1. *VERDICT—when set aside as against the evidence.* A verdict clearly against the evidence will be set aside by the Appellate Court on review.

2. *"BURDEN OF PROOF"—when phrase erroneously used in instruction.* Where the phrase "burden of proof" is used to mean other than the obligation on the party who asserts the affirmative of the issue to prove the same by a preponderance of the evidence, the sense in which such words is used should be clearly indicated.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Reversed and remanded. Opinion filed May 14, 1907.

**Statement by the Court.** Plaintiff, in an action on the case for personal injuries, filed a declaration containing four counts. At the close of the evidence the court instructed the jury to find the defendant not guilty as to the second, third and fourth counts. The jury found the defendant guilty and assessed plaintiff's damages at \$7,000, from which plaintiff remitted \$2,000, and judgment was entered for \$5,000, to reverse which defendant prosecutes this appeal.

The first count alleges that on June 20, 1902, defendant was possessed of and operating a certain electric street car on certain tracks used by the defendant in North Robey street, Chicago, between Fulton street and Carroll avenue; that plaintiff was a passenger

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upon said street car, which was an open south-bound car; that said car was then and there under the care and management of divers of defendant's servants who were driving the car along said North Robey street; that "defendant then and there by its said servants so carelessly and improperly drove and managed the said street car, that by or through the negligence, mismanagement and unskillfulness of the defendant by its said servants in that behalf, the said street car in which the plaintiff was riding, as aforesaid, then and there ran into and struck and collided with great force and violence with a certain wagon being upon and along said public street or highway, and by means of the force and violence with which said street car \* \* \* struck and collided with said wagon \* \* \* the plaintiff \* \* \* in the exercise of all due care and diligence for her own safety \* \* \* was then and there thrown with great force and violence from and out of said street car \* \* \* to and upon the ground," thereby receiving the injuries complained of.

The defendant pleaded not guilty to the declaration.

Plaintiff was a passenger on a south-bound electric car on Robey street, which, near the middle of a block, came in contact with a wagon upon which was a bulky load of planks, horses, wheelbarrows and other building contractors' tools and appliances.

The evidence given for the plaintiff tends to show that by the collision between the car and the wagon, plaintiff was thrown from the car and injured.

JOHN A. ROSE and ALBERT M. CROSS, for appellant;  
W. W. GUBLEY, of counsel.

COLSON & JOHNSON, for appellee; O. W. DYNES, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

We will first consider the question whether the ver-

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dict was against the evidence. Plaintiff testified that she was sitting on the west side of an open car at the outer end of the seat facing the rear end of the car; that the car struck something, she did not know what, and she was thrown from the car to the ground and injured. Her son, then twelve years old, testified that he sat on the same seat with his mother next to the aisle; that they were riding backward; that there was a rail at the outer end of the seat; that "the car gave a jolt and my mother was thrown right off her seat, right out of it—gave a terrible lift. The car seemed to lift right up in the air \* \* \* the car went about three feet and stopped." Sitting, as the plaintiff was, riding backward, with the back of a seat behind her and a rail at the outer end of the seat, it is difficult to see how she could have been thrown out of the car in the manner and from the cause stated by her and her son. The sudden stopping of the car would tend to throw her in the direction the car was moving, to throw her against the back of the seat, and would not tend to throw her out of the car at right angle to such direction.

The only witness for the plaintiff who testified to seeing what it was that the car came in contact with, was Nathan Samelow. He was confused as to the points of the compass and between right and left, but we think that the substance of what he intended to state was, that he was driving north in the east track; that in front of him was the loaded wagon, and behind him a street car; that the car bell rang; that witness turned out of the track to the east and the wagon in front of him turned to the west into the west or south-bound track; that after the north-bound car had passed, the team and wagon in front of him turned to the east, but before the wagon had gone far enough to the east to permit a car on the south-bound track to pass by it, the car in question came up to the wagon, struck it, and plaintiff fell from the car. He further testified in chief that the car struck the "corner of the

wagon; the west side corner. Q. Was it the rear or front of the wagon which was struck? A. The rear."

Appellee contends that Champlin, a witness for the defendant, testified that when the wagon turned to the east, the rear end of it extended over the ground on which the car had to pass, and that therefore his testimony corroborated that of Samelow. Champlin testified that "immediately before the wagon got to the alley in this block, it turned and went east, started east and as it did so, the wagon which, as I said before, was heavily loaded, the rear of it extending over the ground our car had to pass over, the front of the car got by before we met the wheelbarrows which were extending over the end, and one or more scraped alongside of the car and finally one fell into the car." \* \* \* Q. "At the time the rear of the wagon was in contact with the car, which way were the horses headed? A. Pretty nearly directly east. Q. Had the front wheels got out of the track? A. I should say they had."

If, when the car came up to the wagon, any part of the wagon or its load extended into the space required for the car to pass by the wagon, the front end of the car would strike whatever part of the wagon or its load extended into such space.

It is common knowledge that in turning a wagon out of a car track, the hind axle will usually turn for a time upon the point of contact between the hind wheel on the side towards which the wagon is turning and the rail, as a pivot, and that in such case, if the bed of the wagon, or its load, extends back from the axle, the hind end of the wagon or its load will swing outward in the direction opposite to that in which the wagon is turning.

Champlin's testimony that the front end of the car passed by the wagon without striking; that when the wheelbarrow on the hind end of the wagon came in contact with the car, the horses were headed east and the front wheels out of the track, is consistent with the hypothesis that after the front end of the car passed by the wagon, the hind end of the wagon was thrown west,

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nearer to the south-bound track, by the turning of the wagon to the east out of the north-bound track, but inconsistent with the hypothesis that as the car came up to the wagon, the rear end of the wagon, or its load, extended over the ground on which the car had to pass. Taking all of his testimony together, and it does not, in our opinion, tend to corroborate, but to contradict, the testimony of Samelow as to the position of the wagon and its load when the car came up to it.

For the defendant, Holland and Guetschow, passengers on the car, Thompson its motorman, and Forsberg its conductor, testified that when the car came up to the wagon there was room to pass; that when the car was about opposite the team, the driver turned his team to the east to drive east in an alley; that the front end of the car passed by the wagon safely, but that while the car was passing the wagon, the rear end of the wagon or its load swung towards the car and rubbed against or scraped the side of the car from a point some distance back of its front end. The testimony of Champlin, as has been said, corroborated the testimony of the other witnesses for the defendant.

The testimony of the motorman and the conductor was, that as the car approached the wagon, the car was running very slow; that the instant the driver of the team began to turn his team to the east, the motorman applied the brakes and made every possible effort to stop the car, and there is no evidence to the contrary. All the witnesses testify that the car ran but a few feet after it came in contact with the wagon.

If the verdict can be sustained, it must be sustained upon the ground that, from the evidence, the jury might properly find, as a fact, that when the car approached the wagon, some part of the wagon, or its load, was upon or so near to the south-bound track that the car on that track in attempting to pass by the wagon, struck it or the load upon it. Upon this question we have, in support of the verdict, only the confused testimony of Samelow. Against it we have the testimony of five

witnesses. No witness for the plaintiff testified that the front end of the car struck the wagon, and the witnesses for the defendant testified that it did not; that the wagon, or its load, first came in contact with the side, not the front end of the car. No witness on either side testified that either the car or wagon was broken or damaged by the contact or collision between the car and the wagon.

If the wagon had been where Samelow testified it was, the front end of the car would have struck the wagon. If the car had struck the wagon with such force as the testimony of the plaintiff and her son tended to show it did, it is almost certain that both the car and wagon would have been broken and damaged by such striking.

In our opinion, the verdict was clearly against the evidence, and for that reason the court erred in overruling defendant's motion for a new trial.

The following instruction was given for the plaintiff:

"The court instructs the jury that if they believe from the evidence, under the instructions of the court, that the plaintiff, while in the exercise of ordinary care for her own safety, was injured while traveling as a passenger on one of the cars of the defendant, and that the accident was not due to a cause beyond the control of the defendant, that is, that it was not the manner in which the team and wagon were driven which produced or tended to produce the accident, then the burden of proof is upon the defendant of showing that the injury was not due to the negligence of the defendant charged in the declaration."

The burden of proving negligence was, throughout the case, upon the plaintiff, and the court so instructed the jury at the request of the defendant.

Appellee's counsel contend that the phrase, "burden of proof," in the instruction in question, means the duty of producing evidence to meet a *prima facie* case, and cite in support of such contention C. U. T. Co. v. Mee, 218 Ill. 15. What was decided in that case was, that it was error in a case where the question was whether defendant's street car, upon which plaintiff

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was riding, ran into a wagon, or the wagon backed into the car, to refuse to give for the defendant instructions that the burden of proof is not upon the defendant to show that it is not guilty of negligence, but is upon the plaintiff to prove by a preponderance of the evidence, that the defendant was guilty of negligence, and that in default of such preponderance the verdict should be for the defendant.

The phrase, "burden of proof," generally means the obligation on the party who asserts the affirmative of the issue to prove the issue by a preponderance of the evidence. In that sense the phrase is used in instructions given for the defendant in this case, and in instructions given in almost every criminal and civil case. If the phrase is used in an instruction in any other sense, or with any other meaning, such sense or meaning should be clearly stated in the instruction. We think the instruction should not have been given.

For the errors indicated, the judgment will be reversed and the cause remanded.

*Reversed and remanded.*

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### Charles L. Will v. Lillian Will.

Gen. No. 18,088.

**SEPARATE MAINTENANCE—what essential to relief in proceeding for.** A decree will not be entered upon a bill praying for separate maintenance, unless it appears that at the time of the filing thereof the complainant was living separate and apart from the defendant.

Separate maintenance proceeding. Error to the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Reversed and remanded. Opinion filed May 14, 1907.

**Statement by the Court.** This writ of error is prosecuted from a decree entered in the Superior Court granting the defendant in error separate maintenance

in the sum of \$65 per month, and the control of her son.

The bill filed by complainant below avers the marriage of herself and defendant occurred on March 20, 1890, and that they lived together as husband and wife until about November 25, 1904, since which date the defendant has refused to live and cohabit with the complainant, and that they are living separate and apart at the time of the filing of the bill and that a child, then four years and eight months old, was born to them; that a friendship sprang up between defendant and Emily S. Wallace, a nurse who attended upon complainant in error in her sickness; that they became in love with each other and that defendant committed adultery with Miss Wallace in Omaha, Nebraska, in the early part of the year 1903 and in Chicago in 1904; that since defendant became infatuated with said Wallace he has treated complainant with very little consideration; that said Wallace lived in their home for several years except when she was temporarily absent at intervals, until January 11, 1905; that defendant ceased his marital relations with complainant in November, 1904, and has persisted in such cessation until the present time; that in January, 1905, complainant sent said Wallace away from their home, and that she thereupon made her home with the parents of plaintiff in error in an apartment in the same building where defendant spends all his time except when at business; that defendant now only furnishes complainant with a place to live, but with no money or clothing for herself or son; that she is without means to support herself and son or to prosecute this suit.

The bill then alleges that defendant receives a salary of \$150 per month; that she fears that as soon as he learns of the institution of this suit he will do her great bodily harm unless restrained by injunction; that defendant has lately threatened to leave this state and go where complainant will be unable to obtain any relief against him, and prays for separate maintenance for herself and son and for an allowance of money with

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which to prosecute this suit and for a *ne exeat repub-lica* and an injunction.

The Superior Court ordered the injunction and the *ne exeat* to issue.

The answer of defendant was filed March 30, 1905. It admits the marriage and alleges that complainant and defendant lived together as husband and wife from their marriage until January 10, 1905, and that he at all times treated complainant as a loving and affectionate husband; denies that he refused to live and co-habit with her, and alleges that complainant deserted him without cause; denies that she performed the duties and demeaned herself as a loving and affectionate wife; admits that they are now living apart and asserts that it is wholly the fault of complainant; admits that one child was born to them and alleges the name of the child is Howard Wallace Will, the middle name, Wallace, having been given to the child at the request of complainant in evidence of her regard for Miss Wallace; denies he ever committed adultery with Miss Wallace; alleges that she was a trained nurse and entered his family in 1898 in that capacity, and nursed and cared for complainant during a long illness and at the same time managed the household affairs for complainant, and so endeared herself to complainant that upon recovering from her illness complainant besought said Wallace to make her home with her as a member of her family except as she might be engaged in her professional duties, and that defendant consented thereto, and said Wallace resided in their family until January 10, 1905, and was treated as a member of the family; denies all acts of familiarity with Wallace averred in the bill; alleges that at the time the bill was filed complainant and defendant occupied a comfortable flat for which defendant paid the rent; that the flat was luxuriously furnished and defendant provided a horse and carriage for the family use and provided liberally for complainant's clothing and for every wish and desire to the best of his ability, and in so doing became indebted to the extent of \$3,000;

that defendant took out policies of insurance on his life in two companies, payable to complainant in the event of his death, thereby seeking to provide for complainant in the event of his death; that at the time of filing his answer he is without property or estate; that prior to the institution of this suit he was in receipt of a salary of \$150 per month, but that he has been discharged on account of these proceedings, and that complainant has broken up the home provided for her and has removed and secreted all the furniture and compelled defendant to surrender his said life insurance, and the cancellation value thereof has been sequestered under order of this court for the benefit of complainant.

Upon the hearing the court entered a decree finding that the allegations of the bill charging that defendant committed adultery with Emily S. Wallace are not sustained by the proofs; that complainant and defendant are living separate and apart without fault of the complainant, but on account of the fault of the defendant, and decrees that the complainant is entitled to separate maintenance from the defendant, and orders defendant to pay complainant \$65 per month, and that the money impounded with the clerk of the court in this cause be used for the payments of said monthly allowance until said moneys are exhausted, and that defendant thereafter make such payments, and gives the custody and care of the child to the complainant.

JOSEPH W. LATIMER, for plaintiff in error; BENJAMIN T. RODHOUSE, of counsel.

ARND & ARND, for defendant in error.

MR. JUSTICE SMITH delivered the opinion of the court.

The testimony of complainant below, defendant in error, upon the vital question presented by this bill as a basis for the decree prayed for, is as follows: that the marital relations between her and her husband

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ceased November 28, 1904. "Q. What was the cause of the cessation of these relations; what was said between you—your husband and yourself? A. Nothing; he did not say anything that I know of, nor I. Q. Well, who caused the cessation of these relations? A. Neither of us, I guess, unless it was Mr. Will. Nothing was said or done. We had our room together and slept in the same bed, and continued to occupy the same bed until about the 25th of January, 1905. Miss Wallace left about the middle of January, 1905. My husband and I did not hold any conversation after the night she left in January. He did not speak to me after that. Well I prepared the meals and tried to do right as a wife, but he had nothing to say after that."

After describing what took place between them regarding the sending away of Miss Wallace's trunk the complainant testified: "I remained in my apartment. He was in the front chamber and he leaves it to me. I did not eat with him; he went up-stairs with his mother. I paid the grocery bill with his money. I have not lived in the apartment since March of this year. He left me and went up and took his meals with his mother, then he would come down and get up and fix his bed and go out, and I never saw him since. I am living with my mother. My furniture is in storage. I got his meals and called him to come down and eat with us and he said no he would not. He was taking his meals with his mother two or three weeks, I guess, before I left the apartment. I was living at home with my son when the suit was started and left the apartment afterwards. Mr. Will furnished me five dollars a week to run the house. Every Tuesday I got five dollars."

On cross-examination she testified: "I first went to see Mr. Arnd (her solicitor) in January, 1905. My husband was then sleeping at home every day. My husband was then sleeping there at the apartment after this bill was filed. He left me money on his dresser twice, I guess. The bill was sworn to February 7th and filed February 8th. I was also buying groceries in a

store on a bill at that time and they were duly paid for by my husband."

Complainant then relates a conversation with her husband one afternoon when he came home, as follows: "I told him I wanted a little money to get my boy some night clothes. I said I was going to get them charged at Field's, but I thought I had not better, and he gave me two dollars to get them. I said 'Now, Charlie, won't you try and do right by me for the sake of our boy?' And he says, 'I cannot. I have thought it all over for a long time and I cannot forgive you for going and telling your friends about Miss Wallace and I and running us down.' I says, 'What do you want me to do?' He says, 'We will settle this thing in a quiet manner. You get your lawyer and I'll get mine.' I said, 'Very well, I only wanted to know what you wished to do.'"

Complainant fixes the time of the above conversation as the last part of January or the first of February about the time the bill was filed. She admitted in her testimony that she had not made any effort to get him to come back to the house, saying she had not seen him at all since she left the house; that the day they went into court defendant asked her if she would come back to him and she replied she would let the law take its course. She also admitted meeting him once since then and trying to avoid him, and that he asked her again to come back to him, but she refused; and further, when they went to the apartment to divide the furniture defendant called her out into the kitchen and asked her if she would not be willing to remain in the house and she did not remember her response to him.

We have above set forth all the evidence in the record offered on behalf of the complainant to sustain the averment of her bill that the defendant had failed or refused to discharge the common law duty of a husband to furnish support and maintenance for his wife suitable to the condition of the parties in life, where she is living separate and apart from him without her fault. We have not set out the substance of the evidence as

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to the relations of the defendant, plaintiff in error, with Miss Wallace, because this is a bill for separate maintenance, not a bill for divorce on the ground of adultery, and that evidence is not material to the question upon which the bill is necessarily founded.

It is insisted on behalf of defendant in error that the question whether the complainant and defendant were living separate and apart at the time the bill of complaint was filed was never an issue in the case for the reason that the answer avers that the parties "resided together as husband and wife from the date of said marriage until the 10th day of January, 1905," and "this defendant Charles L. Will admits that the defendant and said complainant, Lillian Will, are now living separate and apart from each other, and this defendant avers and alleges that said complainant, Lillian Will, is wholly at fault in the matter of said separation." And it is contended that this statement in the answer refers to the allegation in the bill of complaint that the parties are living separate and apart at the time of the filing of the bill.

An examination of the answer shows, however, that the above quoted allegation of the answer has reference to the time of the preparation and filing of the answer. In a subsequent paragraph of the answer it is stated that "at the time said complainant filed her bill of complaint in this cause the said complainant and this defendant occupied and resided in a comfortable steam heated flat in a respectable neighborhood; that this defendant paid a monthly rental for said flat of forty-five dollars; that said flat occupied by this defendant and the said complainant was furnished luxuriously by the defendant with all the necessary provisions, furniture and other conveniences of housekeeping."

In view of these allegations and the evidence offered by defendant on the hearing and the cross-examination of complainant on this point, we think that the contention is without good foundation in the record.

Considering the evidence of complainant alone and by itself, and wholly without reference to the evidence

offered on behalf of defendant, it is apparent that complainant was not living separate and apart from the defendant when she filed her bill. There is nothing in her testimony, giving to it the most favorable construction and indulging in all reasonable inferences favorable to complainant's case, which tends to support the averments of her bill in regard to this essential fact to the complainant's right to the relief prayed. On the contrary she says in her testimony that they were living together in the apartment at the time of the filing of the bill and afterwards, and he was paying the rent and the grocery bills, and gave her five dollars a week in addition, with which to run the house. Complainant does not say that she asked defendant for necessary money and was refused, or that the allowance made to her was insufficient, or that defendant had refused to suitably provide for her in their home in any way.

It thus clearly appears from complainant's testimony that when she filed her bill of complaint defendant was providing her a home which had been deemed by them to be a suitable one for them to live in, and she was living in it, undisturbed by defendant, and he was paying all bills that were being incurred without objection or complaint. We cannot see what more a decree in her favor could give her.

The statute under which this bill was filed provides: "That married women, who, without their fault, now live or hereafter may live separate and apart from their husbands, may have their remedy in equity," etc. In *Ross v. Ross*, 69 Ill. 569, Mr. Justice McAllister, after referring to the common law duty of the husband to provide the wife with necessaries suitable to their condition in life, and the inadequacy of the common law remedy, says at page 572: "The object of the statute is apparent on its face. It is to confer jurisdiction upon the court of equity to enforce the common law duty of the husband to furnish support and maintenance for the wife suitable to the condition of the parties in life, upon her application, in all cases where

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she is living separate and apart from him without her fault, or, in other words, under such circumstances as would enable her to avail herself of the common law remedy of obtaining such support upon the credit of her husband."

The complainant was not living separate and apart from the defendant as provided by the statute, and he was providing her with support and maintenance suitable to their condition in life. She, therefore, under the facts shown by her own testimony, was not clothed with any common law right of action or remedy against him, and she cannot maintain this bill. *Johnson v. Johnson*, 125 Ill. 510; *Klemme v. Klemme*, 37 Ill. App. 54; *Earle v. Earle*, 60 Ill. App. 371.

The view we take of the main question in the case makes it unnecessary for us to consider or discuss the other questions presented in the briefs.

For the reasons given the decree is reversed and the cause is remanded with directions to the Superior Court to dismiss the bill.

*Reversed and remanded with directions.*

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### Royal League v. Anna Sexton Kavanagh.

Gen. No. 18,100.

1. **FRATERNAL BENEFIT SOCIETY—when certificate may be sued on in state other than Illinois.** An action may be maintained upon a benefit certificate in a state other than Illinois, where it does not appear that the contract was necessarily to be performed in Illinois, and where it does appear that the society issuing the certificate was doing business in the state in which the suit is brought.

2. **INJUNCTION—when does not lie to restrain suit upon benefit certificate.** An injunction should not be awarded to restrain an action upon a benefit certificate brought in a state other than Illinois, notwithstanding the certificate was issued in Illinois to, and in favor of, citizens thereof, merely because the courts of another state in which the society issuing the certificate was doing business, have placed upon such contract a construction different from that which had been placed thereon by the courts of Illinois.

Bill for injunction. Appeal from the Circuit Court of Cook county; the Hon. JULIAN W. MACK, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1906. Affirmed. Opinion filed May 14, 1907.

MANN & MILLER, for appellant.

W. S. OPPENHEIM, for appellee; WALTER H. CHAMBERLIN, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

The bill of complaint alleges that appellant is a fraternal insurance society organized under the laws of this state; that it operates and conducts its business through subordinate councils; that each member of the society has a voice and vote in the enactment of by-laws and the government of the society through duly elected representatives who constitute the members of its supreme council or governing body; that one of its subordinate councils is located in Chicago and known as Lake Shore Council No. 59; that in September, 1895, one Thomas W. Kavanagh, then a citizen of this state, residing in Chicago, made application to join appellant and applied for membership in Lake Shore Council, and in order to persuade and influence the appellant to accept him as a member did under date of September 10, 1895, sign a certain application and agreement forming and constituting a part of appellant's medical examiner's blank, which application contained the following language, to wit:—

"If accepted as a member, I agree to comply with, and that my membership and all interests of the persons entitled to such benefits shall be subject to all laws, rules and usages now in force in the order, or which may be hereafter adopted by it."

The bill further alleges that Kavanagh's application for membership was approved; that he was admitted as a member of appellant in Lake Shore Council and there was issued and delivered to him the benefit certificate referred to therein, bearing date September 24, 1895, in which certificate appellee, his

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wife, was named as beneficiary and which certificate contained in part the following language:

"This certificate is issued to Thomas W. Kavanagh, of Lake Shore Council No. 59, Royal League, located at Chicago, Illinois, upon evidence received from said Council that he is a contributor to the Widows' and Orphans' Benefit Fund of this Order; and upon condition that the statements made by him in his application for membership in the said Council, the representations and agreements made and subscribed to by him in the medical examiner's blank \*.\* \* be made a part of this contract, and upon the condition that the said member complies, in future, with the laws, rules and regulations now governing the said Council and Fund, or that may hereafter be enacted by the Supreme Council to govern said Council and Fund, all of which are also made a part of this contract. These conditions being expressly assented to and complied with, the Supreme Council of the Royal League hereby promises and binds itself to pay out of the Widows' and Orphans' Benefit Fund, to Anna Sexton Kavanagh, wife, a sum not exceeding \$4,000.00, in accordance with and under the provisions of the law governing said fund," etc.

That said certificate was delivered to and accepted by Kavanagh and his acceptance thereof evidenced by an endorsement upon the bottom thereof reading: "I accept this certificate on the conditions named herein," which he signed.

The bill further shows that at the time Kavanagh joined the order there was in force a suicide by-law to the effect that if any member should, within two years subsequent to his admission into the order, die by his own act or hand, sane or insane, his beneficiary should receive only one-half of the face of the certificate; that that time was subsequently changed to five years, then another change removed the limitation of time entirely, and in April, 1905, the suicide by-law was amended so as to fix the amount which should be paid to the beneficiary at the total amount actually paid by the member to the Widows' and Orphans' Benefit

Fund, which by-law went into force on July 1, 1905, and was in force on August 29, 1905, at which date, the bill alleges, Kavanagh committed suicide in the city of New York, leaving him surviving appellee, his widow, as his beneficiary.

The bill further alleges that Kavanagh was a citizen of Illinois when he joined the order, and continued so to be thereafter until his death, and it charges upon information and belief that he and his wife, the appellee, resided together in Cook county and continued to reside here from the time he joined the order until the date of his death, and that appellee is now a citizen of Illinois and resident of Cook county.

The bill further alleges that the suicide by-law which was in force when Kavanagh committed suicide was valid and binding upon him and his beneficiary, although adopted subsequent to his joining the order, by reason of the fact that in his contract with appellant there is contained an agreement that such member would be bound by, and the interests of all persons entitled to benefits subject to the laws, rules and usages in force in the order at the time of the member's joining the order or which might thereafter be adopted by it; that by reason of the suicide of the said Kavanagh the liability of appellant to appellee was for the sum of \$322.84, which constitutes the actual amount paid by said Kavanagh into the Widows' and Orphans' Benefit Fund of appellant.

It is further alleged that in the Morton case (100 Mo. App. p. 76) it has been settled as the rule of law in Missouri that suicide by-laws of appellant adopted subsequent to the date of the member's joining the order are not binding upon him or his beneficiary, although by the terms of the contract of membership there is an agreement contained therein that such member and his beneficiary shall be bound thereby so that the rule of the law which obtains in the State of Missouri upon this question is directly contrary to the rule which obtains in this state; that appellant is licensed to do business in the State of Missouri, has

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subordinate Councils there, has agents upon whom service can be had, so that appellee will be able to procure service upon appellant in Missouri in case of her going into that jurisdiction and beginning suit.

It is further alleged that the contract entered into between appellant and said Kavanagh and which was in force at the time of his death was entered into between two citizens of Illinois, in the State of Illinois; that the benefit certificate in question was delivered in Illinois, the assessments required to be paid by Kavanagh paid in Illinois, and that under the law the place of performance of said contract was and is in Illinois, so that said contract is an Illinois contract, into which the laws of Illinois enter and form a part, and that appellant is entitled to have its rights and liabilities under and by virtue of said contract adjudicated and determined under and in accordance with the laws of Illinois.

The bill further alleges that if appellee begins proceedings against appellant in Missouri upon said contract, appellant cannot obtain the benefit of the laws of Illinois by pleading such laws in any suit begun in Missouri, for the reason that the rule of law in Illinois holding a member and his beneficiary bound by by-laws enacted after the member has joined the order, where there is an agreement in the contract to be so bound, does not rest upon a statute in force in Illinois, but is a rule of the common law, and that it has been determined and settled to be the law in Missouri in the Campbell case (100 Mo. App. p. 249), that where the courts of the State of Missouri are called upon to consider and construe a contract entered into in a sister state and the rule of law which obtains in the state where the contract was made or was to be performed is other and different than the rule which obtains in the State of Missouri, and the rule of law which obtains in the state where the contract was made or was to be performed, is a rule of the common law of that state and not based upon the statutes thereof, the courts of Missouri will not follow the rule which

obtains in the state where the contract was made or to be performed, but will construe said contract according to the rule which obtains in the State of Missouri; that the appellee, in order to evade the rules of law which obtain in Illinois and by which her rights should be determined, and in order to avail herself of the rules which obtain in Missouri, threatens and intends to bring legal proceedings against appellant in Missouri and in the courts of that state on the benefit certificate in question in order to compel appellants to pay \$4,000, when in truth and in fact appellant is liable for only \$322.84, which action and conduct on the part of appellee, the bill charges, would be a fraud upon appellant and result in depriving it of its rights under the laws of this state.

It is further alleged that appellant has a membership of more than 27,500 members, of which about 20,000 are in Illinois, holding contracts of membership made and entered into in the State of Illinois and to be performed in Illinois, where the benefit certificates were delivered and dues and assessments were paid in Illinois, so that said contracts are governed by the laws of Illinois, and that to permit appellee to begin and maintain a suit in the State of Missouri, where the rules of law governing this case are different than in Illinois, and where the courts will not follow the law of Illinois, will be to permit appellee not only to work a fraud upon appellant, but likewise upon those members residing in and citizens of the State of Illinois and holding Illinois contracts.

The bill then avows appellant's ability and readiness to pay to appellee whatever sum is due her, and it tenders into court and offers to pay to the clerk of the court, subject to the court's order, \$322.84, etc.

There is then the usual prayer that appellee be compelled to answer, but not under oath, and that a writ of injunction issue to restrain appellee from proceeding against appellant in any form or action whatever on said benefit certificate in the courts of Missouri or of any other state where, under the laws of such state,

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the courts of that state will not be required to construe and enforce the contract in question in accordance with the laws of Illinois, and for general relief, etc.

Upon the recommendation of the master an injunction was issued, as prayed for in the bill of complaint, upon the filing of a bond in the sum of \$4,000, which was approved by the court.

The bill of complaint was filed and the bond approved March 6, 1906. April 4, 1906, a general demurrer was filed to the bill of complaint and on May 3, 1906, the court entered a decree dissolving the injunction, sustaining the demurrer to the bill and, a suggestion of damages having been filed, assessing appellee's damages at the sum of \$100. Appellant electing to stand by its bill of complaint, the bill was dismissed at its cost, whereupon this appeal was prayed and perfected.

The question presented by the record is, did the chancellor err in sustaining the demurrer to the bill?

The equitable ground presented by the bill of appellant as the basis for the injunction prayed for is, that because of the fact that Thomas W. Kavanagh, while a citizen of the State of Illinois became a member of appellant, a benefit society organized under the laws of this state, with a membership extending throughout this state and the State of Missouri, and continued to be a citizen of this state until his death, and for the further reason that appellee is now residing in this state, it is inequitable for appellee to sue appellant in the State of Missouri and secure the same rights as are accorded to other members of appellant living in that state.

The bill concedes that under the law of the State of Missouri, all appellant's beneficiaries residing in that state are entitled to resort to the courts of Missouri and recover judgments against it for the face amounts of their benefit certificates, but it claims that beneficiaries residing in Illinois at the time the suit

is brought do not have that right, and that an attempt on the part of the beneficiary residing here to resort to the courts of Missouri should be enjoined. Reduced to its elements, this is the theory of the bill and the argument of counsel.

For the purposes of this case, in the view we take of it, many of the propositions advanced in behalf of appellant may be conceded, namely: That the constitution, by-laws, application for membership and benefit certificate enter into and form a part of the contract between a fraternal benefit society and its members and beneficiaries; that where the contract between a fraternal beneficiary society and one of its members contains an agreement that the member will comply with and abide or be bound by future enacted by-laws, such by-laws are sustained, where they are not unreasonable in character, and suicide by-laws are held to be reasonable. The law of the place where a contract is made, if it be performed there, must govern; if to be performed elsewhere, then the law of that place enters into the contract, governs its construction and determines its validity; and that each state has its own common law. We do not find it necessary, however, to pass upon these propositions in reaching our conclusion in this case. The demurrer admits the averments of the bill that the courts of Missouri hold that a member of a beneficiary society and his beneficiary are not bound by subsequently enacted suicide by-laws, even though the contract of membership contains an agreement that they will be so bound, as held in *Morton v. Supreme Council*, 100 Mo. App. 76, cited in the bill. And that the courts of Missouri hold that "While the rights of parties under contracts made and to be *performed* in a sister state are usually measured by the laws of such state, even when the enforcement of the contract may be sought in this state, yet we cannot adopt and yield to a mere interpretation of a contract not confined in its performance to that state, but is susceptible of execution elsewhere, \* \* \* in direct conflict with the rule in this state," as held in the case of *Campbell v.*

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American Benefit Club Fraternity, 100 Mo. App. 249.

It is to be stated, however, in this connection that in *Morton v. Supreme Council*, *supra*, while the contract there, like the contract here involved, contained an express provision that the members should be bound by subsequently enacted by-laws, the defendant failed to plead and prove the law of Illinois, and the court, after noting the fact, and commenting upon the “senseless rule of practice” which still obtains, requiring a party, where an action or defense rests on a foreign law, even if it be one of a sister state of the Union, to plead and prove such law as a fact, says that it must be governed by the rule of practice, “and, as the answer contains no averment in regard to the decisions of the courts of Illinois on the crucial question in the case, we cannot determine it solely by the decisions of those courts, but must be governed by the weight of authority.” It is clear, therefore, that the court does not hold in that case that if the law of Illinois had been presented to the court in the proper manner, it would have decided differently from the Illinois courts upon the question as to whether a member of a beneficiary society, or his beneficiary, is bound by subsequently enacted suicide by-laws, where the contract of membership contains an agreement to that effect.

It should also be noted that there is no provision in the contract set up in the bill which provides that it is to be performed in Illinois. Appellant is a corporation doing business and having members in several states of the Union. It agrees to perform its contracts wherever it is doing business or its members reside. The contract is not of such a nature that it must be performed by either party in any particular place. Had appellee removed to Missouri either before or after the death of her husband, it cannot be doubted that she could have called upon appellant to perform, and appellant would have been bound to perform in that state. The mere accident of place or residence of the beneficiary when the certificate matured, or when proofs of death were made under it, or when demand

was made for payment, being no part of the contract, cannot have the legal effect to fix the place of performance at any particular place.

Directing now our attention to *Campbell v. American Benefit Club Fraternity*, 100 Mo. App. 249, referred to in the bill with this consideration in mind, we find the society was organized under the laws of the State of Kentucky and transacted business in Mississippi. The case involved the validity of a subsequently enacted by-law, with an agreement in the contract on the part of the member to be bound by such by-laws. Under the decisions of the Supreme Court of Mississippi, the by-law was binding upon the beneficiary of the deceased member. The law of Mississippi as established by the decisions of the Supreme Court of that state was pleaded and proven in a suit brought in Missouri. The court in disposing of the question used the language above quoted. This, we think, is a clear recognition of the doctrine that where the contract is made and is to be performed by its terms and provisions in a sister state, it will be enforced in Missouri according to the law of the state where made and to be performed. The inference is also plain, and it may be said to appear affirmatively in the decisions referred to, that if the contract set out in the bill is one of that character, as contended by appellant, it will be enforced in Missouri according to the law of Illinois.

This, then, is the extent, and the full extent, of the admission by the demurrer, as to the law of Missouri as averred in the bill, according to the cases cited and relied upon in the bill.

We are inclined to the opinion, as above suggested, that the contract in question is not a contract to be performed in this state and nowhere else by either party. It has none of the elements or ear-marks of such a contract. It contains no express provisions which necessarily or by implication impress such a character upon it. Payment of dues or assessments made anywhere to an officer or agent of appellant would be as effectual as if made in Illinois. The rights

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of the beneficiary of the deceased member are not local to the State of Illinois, nor are they bounded by state lines. Appellant has no contract right to perform in this state and not elsewhere, or have performance enforced in this state only. It certainly has no implied legal right of that nature. It follows that no substantial right of appellant is violated by commencing suit against it in Missouri, or any other state where it is doing business, and prosecuting such suit to judgment. This would doubtless be conceded by counsel for appellant, if the Missouri court gave the same construction to the contract as the Illinois courts.

The question then is, does the fact that the courts of that state have construed the contract differently, resulting in a different measure of damages, constitute a ground for equitable relief by injunction? Or, to state the question in another way, will a court of equity enjoin appellee from availing herself of the laws of Missouri where appellant is doing business, under the averments of the bill, upon the ground that the courts of that state place a different construction upon the contract from that of the Illinois courts?

We think the proposition must be answered in the negative for several reasons.

It is not questioned that upon the ground of fraud a court of equity will interfere to prevent those who are amenable to its process from instituting or carrying on suits in other states. Where a creditor institutes an action of attachment and garnishee proceedings in another state for the purpose of gaining a preference over the complainant or depriving him of some legal right, such as immunity against imprisonment for debt, or seeks to evade the laws of the state by resorting to the courts of another state, thereby perpetrating a fraud, equity will interfere. The case of Dehon v. Foster, 86 Mass. 545, cited by appellant, is an instance of an attempt on the part of one party to avoid the insolvent laws of Massachusetts and obtain a preference over the complainant and others by attaching a debt due the insolvents in Pennsylvania,

thus interfering with the administration of the insolvent estate in Massachusetts and the equitable division of that estate among the creditors, by the complainant Dehon, the assignee. It requires only a brief statement of the case to distinguish it from the case at bar.

Snook v. Snetzer, 25 Ohio St. 517, cited by appellant, involved an attempt on the part of Snook to go into West Virginia and attach the wages of Snetzer, the head of a family, and to thus avoid the exemption law of Ohio, and falls within the doctrine above stated. Many of the cases cited by appellant are of the same character, and we will not take the time to mention them in detail. The basis of the jurisdiction in such cases is that it is a fraud and inequitable for a creditor to secure property which is exempt from his debt under the laws of the state where he and his debtor reside, or to secure a lien on property in another state, which, as between the parties, the creditor ought not to have in equity and good conscience.

The case of Dinsmore, etc., v. Neresheimer et al., 32 Hun 204, cited by appellant, appears to be directly in point, but, so far as we are advised, it is the only case where the commencement and prosecution of a civil action at law in a foreign jurisdiction where no lien or attachment of property, or an exemption statute was involved, is made the ground of equitable interference. If the Dinsmore case announces the law correctly, the prosecution of all suits in foreign jurisdictions between residents of the same state may be enjoined. It is an exceptional case, and cannot be reconciled on principle with the general line of authorities upon that subject. For these reasons we do not consider it an authority which we ought to follow.

The other cases cited by appellant to sustain its contention are plainly distinguishable from the case at bar. This appellant has voluntarily entered the State of Missouri and has received members there on a basis which makes a membership more valuable than in this state, according to the bill. The residents of that state, although paying for their mutual and fraternal insur-

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ance at the same rates as the residents of this state, are, under the law of Missouri, a class of members by themselves, holding certificates of greater value than the certificates of residents of Illinois. The real object of the bill appears to be to prevent appellee, the beneficiary of a fellow member with the Missouri members, whose certificate represents the same assessments and payments as the Missouri members, from sharing in the same manner, and to the same extent and value, in the fraternal benefits as the Missouri members do under the law. This does not appear to us as fair, just and equitable. We cannot say that if appellee prosecutes her proposed suit to judgment, it would be, under the circumstances of this case, such an injury to appellant and such a fraud upon appellant which a court of equity ought to prevent by injunction.

Considering all the facts and circumstances set out in the bill, we are of the opinion that it fails to show a case justifying a court of equity in restraining the prosecution of appellee's suit.

The reasoning of the courts in *Carson v. Dunham*, 149 Mass. 52; *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288; and *Thorndyke v. Thorndyke*, 142 Ill. 450, is persuasive, and the principles announced seem to us to control the disposition of this case. According to these cases, the showing that the law is more favorable to the defendant in the jurisdiction selected by him, or that there is danger that the courts of that jurisdiction will not rightly and justly decide the rights of the parties, does not justify a court of equity in exercising its restraining power upon the parties. *High on Injunctions* (3rd ed.), sec. 107; *Pomeroy Eq. Jur.*, sec. 1361.

The decree of the Circuit Court is affirmed.

*Affirmed.*

**The T. E. Hill Company v. John L. Cleary et al.**

Gen. No. 18,449.

1. CORPORATION—*when bill to dissolve, does not lie.* A bill does not lie under section 25 of the Corporation Act to dissolve a corporation for non-user, where it appears that the non-user resulted from the fact that possession of the corporate property had been taken under a pending involuntary bankruptcy proceeding.

2. ASSIGNMENTS—*jurisdiction of County Court with respect to.* The jurisdiction of the County Court with respect to assignments, is exclusive, and where a debtor makes an assignment for the benefit of his creditors, or for the benefit of a creditor, the right and power of the County Court to administer the same at once arises.

Bill to dissolve corporation, etc. Appeal from the Superior Court of Cook county; the Hon. WILLARD M. MC EWEN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Reversed. Opinion filed May 14, 1907.

DOLPH, BUELL & ABBEY, for appellant.

E. P. HARNEY, for appellees; JOHN S. STEVENS, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

This is an appeal from an interlocutory order of the Superior Court appointing a receiver for the property and effects of The T. E. Hill Company, appellant, a corporation for pecuniary profit organized under the laws of Illinois, with a capital of \$50,000, for the purpose of carrying on the business of contractors, engineering and manufacturing and dealing in builders' supplies.

The bill was filed November 23, 1906, under section 25 of the General Incorporation Act, by appellees as contract creditors of appellant in behalf of themselves and all other creditors of the company who might join therein. It made the appellant company, its stockholders, William A. Bither, assignee of the company's property, and William A. Coleman, receiver in bankruptcy proceedings against the company, parties defendant.

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The bill alleges that the company became financially embarrassed, and certain creditors filed an involuntary petition in bankruptcy against it in the Federal Court on September 21, 1905, and on that date William A. Coleman was appointed receiver for the property of the company by that court, and he qualified and took possession of the property of the company; that Coleman acted as such receiver from the date of his appointment until October 25, 1906, when the United States Court of Appeals affirmed the decision of the United States District Court, holding that the company was not amenable to the Bankruptcy Act and dismissed the petition.

The bill alleges that at the time the company ceased to do business as aforesaid, it was and still is indebted to divers persons in sums of money largely in excess of its assets; that its assets consist of machinery, tools, horses, wagons and other equipments and material for the construction of bridges and abutments, or the proceeds thereof, of the value of \$10,000; that Coleman has in his possession as such receiver between \$4,000 and \$5,000 of the proceeds of the sale of a part of the property and the assets and property should be taken possession of by a receiver to be appointed by the court.

The bill alleges, upon information and belief, that in the course of business divers persons, firms and corporations became indebted to the company in large amounts which are still due and should be taken possession of by the receiver and applied to the payment of the debts of the company. The officers and stockholders with the number of shares held by each is then stated.

The bill further alleges that on February 13, 1906, while the bankruptcy proceedings were pending in the United States District Court, a deed of assignment was filed in the office of the recorder of deeds of Cook county, Illinois, purporting to assign and transfer all the property and effects of the company to one William A. Bither; that the deed of assignment and

all proceedings in the premises were wholly void; that the company owed debts in excess of \$45,000; that its assets did not exceed in value \$10,000; that the company is insolvent and has not for more than six months last past performed or attempted to perform any business of any kind, nature or description and has not attempted to exercise its corporate functions and has entirely abandoned its office, property, effects and business; that the president and secretary and treasurer are now and have been for several months last past engaged in contract work outside of the State of Illinois and in the State of Utah in their individual capacity; that the company has not in its employ any person, nor has it any known place of business; that by reason of the abandonment of the property of the company by its officers, the complainants are unable to state and do not know where the company may be found; that certain named subscribers to the capital stock of said company never paid the full amount of their subscriptions and are still indebted to the company in large sums of money, and that each of said subscribers should be compelled to pay to the receiver to be appointed by the court his *pro rata* share of the debts or liabilities, including the amounts due to the complainants to the extent of the unpaid portion of his stock, after exhausting the assets of the company.

The bill represents that the property of the company is in the hands of said Coleman, receiver, and that by reason of the decision of the United States Circuit Court of Appeals he is acting without warrant or authority of law; that as the property, assets and effects of the company have been abandoned as aforesaid, there is no one lawfully entitled to the possession thereof, and that unless a receiver is forthwith appointed without notice complainants fear the property may be lost to the estate and unaccounted for, to the irreparable loss of the complainants and others similarly situated.

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The prayer is, among other things, that the company be dissolved and its affairs wound up; that a receiver of the company with the usual powers be appointed.

November 24, 1906, the court appointed Edward H. White receiver of the company without notice on giving a bond in the sum of \$5,000, and without bond by the complainants, and the receiver qualified.

An amendment to the bill was filed January 18, 1907, giving the date of filing the deed of assignment in the office of the county clerk and recorder of deeds as February 13, 1906; and upon information and belief avers that no meeting of the board of directors of the company was called at any time prior to the making of the deed of assignment for the purpose of considering the making of the same; that the directors were not notified that such question would be considered or passed upon by the directors; that said pretended deed of assignment was not made or executed pursuant to any direction or authority of the board of directors, but was made wholly at the instance of the officers, and the execution and delivery thereof was not at any time thereafter ratified or approved or assented to by the board of directors; that the deed was not made in good faith, but was in fact made for the purpose and with the intention of hindering and delaying the creditors of the company in the collection of their debts; that it was the object and design of such of the directors as participated therein, together with the officers of the company who assumed to make said deed, and said assignee, to use said deed for the purpose of enabling the company to coerce its creditors to accept a compromise settlement of their debts against it for a sum less than the assets of said company would fairly pay, and through the device and by means of the deed to keep the company, pending such settlement or other arrangement, in a position to resume control of its property and continue its business. It is further averred that the company and the assignee have admitted that the deed was made for that purpose.

The receivership by an order entered January 18, 1907, was extended to the bill as amended.

The question presented by this appeal is, could a court of equity lawfully appoint a receiver and grant the relief prayed for upon this bill as amended?

It is conceded in argument that courts of chancery are without jurisdiction to decree the dissolution of corporations, except in so far as that jurisdiction is conferred by statute, and that if the Superior Court had jurisdiction to adjudicate upon the subject-matter of the bill and grant the relief prayed at the instance of the complainants as mere contract creditors of the corporation, that jurisdiction is conferred by section 25, chapter 32 of our statute and cannot be attributed to its general equity powers, sitting as a court of chancery.

That section of the statute provides: "If any corporation or its authorized agents shall do, or refrain from doing any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for a payment of money, after demand made by the officer, to be returned 'no property found,' or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business leaving debts unpaid, suits in equity may be brought," etc.

The bill in this case is based upon the clause, "shall dissolve or cease doing business leaving debts unpaid," and upon no other clause or provision of the statute. No attempt is made in the bill to lay any other ground of equity jurisdiction. What then are the averments in the bill showing that the appellant had ceased doing business leaving debts unpaid, at the time the bill was filed?

After showing the organization of the appellant, the bill sets up that appellant became financially embarrassed and that certain of its creditors filed a petition in bankruptcy in the United States District Court on September 21, 1905, and that upon the filing of the petition that court appointed a receiver of appellant's

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property who qualified and took possession of all the property and assets of appellant, and continued to hold them until the bill was filed. There is no averment that at any time prior to the filing of the petition in bankruptcy appellant had ceased doing business leaving debts unpaid.

It appears from the bill that the United States District Court dismissed the petition in bankruptcy filed against appellant, and that the creditors prosecuted a writ of error to the United States Circuit Court of Appeals, which affirmed the order of the District Court dismissing the petition, on October 25, 1906.

From these averments of the bill it appears that the entire property and assets of appellant were in the possession and control of the Federal Court through its receiver during all the time that appellant had ceased doing business. The court may infer from these allegations that the receiver of the Federal Court took possession, upon his appointment, of all the property and effects of appellant wherever situated, whether in the office of appellant or its factory or yards, and that appellant and its officers were ousted of all possession and control, and that appellant had no office except that taken possession of and occupied by the receiver. It is also a matter of fair inference from the bill that during all the period the litigation in the Bankruptcy Court was pending, appellant was actively and successfully engaged in contesting the proceedings of the creditors and the appointment of the receiver, for this inference is not negatived by any averment of the bill. So far, therefore, was appellant from ceasing to do business, it clearly appears from the bill that appellant was actively attending to the most important and most vital business which it had in hand—the recovery of the possession and control of all its property and assets which had been wrongfully taken from it, by the action of its creditors and without which it could not prosecute its regular business.

The bill then alleges that at the time the company ceased to do business as aforesaid, it was and still is indebted to divers persons, etc. This averment refers to the bankruptcy proceedings and the ceasing to do business in consequence thereof.

The bill alleges that while the said proceedings to procure an adjudication of bankruptcy were pending against appellant, the deed of assignment was executed and filed, and that appellant had not for more than six months last past performed or attempted to perform any business of any kind, nature or description, or any corporate functions, and had entirely abandoned its office, property, assets and business. These averments again relate to the bankruptcy proceedings and must be construed in connection with the situation shown by the bill which legally resulted from the bankruptcy proceedings. The abandonment of its office, property and business was occasioned by and the legal result of the wrongful proceedings in bankruptcy against appellant which it resisted to the end, and not by any act of appellant or its officers.

We are of the opinion that the complainants cannot avail themselves of the necessary suspension of business caused by the proceedings to adjudicate appellant a bankrupt, and under the provisions of section 25 of the Corporation Act proceed in equity on that ground to have the corporation dissolved and its affairs wound up. The ceasing to do business set forth in the original bill was not within the meaning and intent of the statute. To so construe the statute that one set of creditors might institute proceedings in bankruptcy in the Federal Court against a corporation and by means of a receiver take possession of all its property and assets of every name and kind, and thus deprive it of all power to pursue its regular and usual business while the question of the right to an adjudication in bankruptcy is being determined in the District Court and on writ of error in the Circuit Court of Appeals, and then upon a dismissal of the proceedings by the court on final hearing another creditor or creditors

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may make the consequent interruption of the regular business of the corporation the basis of a bill under section 25 of the General Corporation Act, to dissolve and wind up the corporation, would make that section of the statute a destructive rather than a remediable measure. It has never been so construed, and we cannot find in the terms of the section any legislative intention or purpose to place corporations so far in the power of their creditors that, though entirely solvent and having no judgments against them, they may be dissolved and their business affairs wound up under the circumstances, or similar circumstances, disclosed in this bill.

By the amendment to the bill the validity of the deed of assignment is attacked on the ground of want of authority in the officers of appellant to execute and deliver it, and upon the ground that it was executed by the company and received by the assignee with the fraudulent purpose of enabling appellant to coerce its creditors to accept a compromise settlement of their debts against it for a sum less than the assets of appellant would fairly pay.

We find it unnecessary to discuss the questions raised by the amendment to the bill further than to say:

First. As we have seen, the averments of the bill do not make a case of equitable jurisdiction under section 25 of the Corporation Act. The only question now before us is the power of the court to enter the order in question appointing a receiver. As said in *The People v. Weigley*, 155 Ill. 491, at page 502: "It is clear if the court was without jurisdiction to grant the ultimate relief prayed by the bill, it has no power to appoint the receiver and authorize him to assume possession and control of the corporation assets." The appointment of the receiver was a mere incident to the relief prayed.

Second. Those questions should be presented to the County Court. *Wilson v. Aaron*, 132 Ill. 238, 242.

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The right of a debtor to make an assignment of his estate for the benefit of creditors existed at common law. The Voluntary Assignment Act controls the assignment and distribution of the estate to and among creditors, and confers upon County Courts original jurisdiction to administer and control the trust created by the deed of assignment. "And in proceedings under that act the jurisdiction of the County Court is exclusive, and after jurisdiction of the assigned estate has attached, no other court will interfere, except where the circumstances are such as to require the interposition of a court of equity to prevent an absolute failure of justice. Hanchett v. Waterbury, *supra*; Preston v. Spaulding, *supra*; Field v. Ridgley, 116 Ill. 424." Howe v. Warren, 154 Ill. 227, 244. See also Weir v. Mowe, 182 Ill. 444.

In our opinion the jurisdiction of the County Court had attached under the assignment. Lowe v. Matson, 140 Ill. 108.

We do not think the facts averred in the bill, as amended, require a court of equity to interpose to prevent a failure of justice.

The order of the Superior Court appointing a receiver is reversed.

*Reversed.*

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#### M. J. Hawley v. The State Bank of Chicago, Receiver.

Gen. No. 18.274.

1. INJUNCTION—*what confers jurisdiction upon court of this state to grant, against non-resident.* The entry of a general appearance by a non-resident against whom an injunction is sought in a court of this state, confers jurisdiction upon such court to grant such injunction.

2. INJUNCTION—*when does not lie at instance of receiver, to restrain prosecution of suit by creditor in courts of another state.* An injunction does not lie, at the instance of a receiver appointed in this state, to restrain a non-resident from prosecuting in the courts of another state an attachment proceeding against the effects of the insolvent.

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3. INJUNCTION—*how far propriety of, affected by non-enforceability.* The courts do not look with favor upon the granting of an injunction by the courts of this state which such courts would be without power to enforce.

BROWN, J., dissenting in part.

Injunctional proceeding. Appeal from the Circuit Court of Cook county; the Hon. Lockwood HONORE, Judge, presiding. Heard in this court at the March term, 1907. Reversed. Opinion filed May 27, 1907.

**Statement by the Court.** This appeal is by one M. J. Hawley from an injunction *pendente lite* issued by a chancellor in the Circuit Court in the case of Buckingham and others against The Traders Insurance Company, on the motion of The State Bank of Chicago, a receiver appointed in said cause. The receiver had filed in said cause a petition, hereinafter more particularly described, against said Hawley, and the injunction was an interlocutory or preliminary one granted pending the final hearing of said petition. It restrained said Hawley, his servants, agents, etc., until the further action of the court, from taking any further steps or proceedings of any kind or nature as against the garnishees in the attachment suit of Hawley against The Traders Insurance Company pending in the Superior Court of the city and county of San Francisco, California.

The facts and proceedings leading up to this order were these:

On May 5, 1906, The Traders Insurance Company of Chicago had suffered severe losses by the earthquake and fire in San Francisco. A majority in amount of its stockholders filed on that date in the Circuit Court of Cook county a bill of complaint against the company, alleging its insolvency and asserting that it had property and assets in various states subject to attachment and garnishment; that if a receiver were not appointed it would be subject to a multiplicity of suits in various jurisdictions, and that its net assets

would be unevenly and inequitably distributed. The bill therefore prayed that the company might be restrained from further prosecution of its business, that a receiver might be appointed to take charge of all its assets, to collect debts and property due it, to prosecute and defend suits in its name, and to do all other acts for the collection, marshaling and distribution of its assets.

It further prayed for a decree upon final hearing dissolving the company and providing for the distribution of its assets to its creditors, and for general relief.

The Traders Insurance Company forthwith answered the bill, admitting its allegations, and a receiver was appointed according to the prayer of the bill. A final decree was entered June 18, 1906, dissolving the corporation, subject to the Act of the General Assembly concerning the dissolution of insurance companies, and confirming the receivership, which, it was ordered, should "continue for the purpose of collecting, marshaling and distributing the assets of the defendant company and closing its concerns and settling its unfinished business, for all of which and all purposes incident thereto, jurisdiction" was "retained in the cause."

July 24, 1906, the receiver filed a petition in the cause, setting forth that one M. J. Hawley had brought an action at law for \$38,000 in the Superior Court of California upon certain fire losses in San Francisco; that said Hawley had sued out an attachment or garnishment process from said California court and served it on a California agent of The American Fire Insurance Company of Newark, New Jersey, which was largely indebted to the Traders Insurance Company.

The petition denied knowledge of the justice of the specific claims made by Hawley against the Traders Insurance Company, but stated that on a certain policy issued to said Hawley proofs of loss had been filed

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with the receiver, and that on a certain other policy, claimed in Hawley's action in California to have been assigned to him by the Vermont Marble Company, proofs of loss had been filed with the receiver by the Marble Company. On these facts it was claimed that said attachment suit of said Hawley was in violation of the rights of the receiver, and an order was prayed that unless the said Hawley should dismiss the said action and said attachment proceedings in California within five days after being served with a copy of the order, the said Hawley and said Marble Company should be forever barred from sharing in the distribution of the estate in the pending Illinois cause, and that the claims already filed by the Marble Company and Hawley should be disallowed.

On the same day, July 24, 1906, an order was entered by the court in accordance with the prayer of this petition.

It appears by stipulation in the present cause that this order "was entered without any notice to said Hawley or the Vermont Marble Company, or to any person representing said Hawley or said Marble Company, and that at the time said order was entered neither Hawley nor the Marble Company, nor any one representing them, was in court, and that at no time has Hawley appeared in person before said court."

On August 6, 1906, a motion to vacate this order of July 24, 1906, was made by M. J. Hawley. This was renewed August 17, 1906, by a written motion, which was signed by "H. R. Pebbles, solicitor for M. J. Hawley, respondent." It assigned six different reasons for the vacation of the order, the sixth being that "the respondent by the levy of the attachment in said petition mentioned, acquired a valid lien upon the funds attached, superior to the rights of the receiver."

It appears by affidavit in the bill of exceptions in the present appeal, that at the time Mr. Pebbles filed this motion he was unaware that the averments in the receiver's petition heretofore described, that Hawley

had filed proofs of loss with the receiver, were not true, and believed that by the filing of such proofs of loss with the receiver, Hawley had made a general appearance in the cause and submitted to the jurisdiction of the court appointing the receiver far enough to enable such court to make orders concerning the allowance or disallowance of such claims. August 20, 1906, it would appear, Pebbles was informed of the fact, thereafter set up in the amended and supplemental petition of the receiver, to be described, that the proofs of loss in question had never been filed with the receiver, but had been addressed to and filed with the Traders Insurance Company itself.

October 3, 1906, there was a hearing by the court of the motion of Hawley to vacate the order of July 24, 1906, and of a cross-motion of the receiver for an order enjoining Hawley from proceeding in the California suit. An order was thereupon entered that Hawley have leave to plead, answer or demur to the petition of July 24, 1906, upon which the order of July 24, 1906, was based, in all respects as though such plea, answer or demurrer had been filed prior to July 24, 1906. It was also ordered that pending the disposition of the motion of Hawley and the motion of the receiver, Hawley should refrain and desist from taking any steps or proceedings in the California suit.

October 13, 1906, a general demurrer was filed by said Hawley to said petition of July 24, 1906, and on November 1, 1906, so much of the order entered on October 3rd as enjoined Hawley was vacated.

February 11, 1907, in pursuance of leave of court, the receiver filed an amended and supplemental petition against Hawley as respondent, reciting, among other things, that in the receiver's petition of July 24, 1906, the statement that proofs of loss had been filed by said Hawley and the Vermont Marble Company with the receiver, was a mistake; that the said proofs of loss had been filed with the Traders Insurance Company.

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The petition also alleged that in the attachment suit in California Hawley had garnisheed many insurance companies indebted to the Traders Co., besides The American Fire Insurance Company of Newark, and that the pendency of the said cause in California interfered with the collection of a very large amount to become due from said companies; that although notice had been served on Hawley, or his attorney, of the order of July 24, 1906, Hawley had not dismissed the said attachment suit; that for the purpose of probating the estate, the receiver had entered its special appearance in the attachment proceeding in the Superior Court of California, and moved to dismiss said proceeding and to quash the service of process therein; that such motions were both denied by said Superior Court; that on August 4, 1906, M. J. Hawley entered his general appearance in the Illinois cause and submitted himself to the jurisdiction of the court, and had from time to time since appeared therein generally and made motions; that after this entry of Hawley's appearance in the Illinois court, and after the denial of the receiver's motions to dismiss and quash in the California case, the receiver directed counsel to enter the appearance of The Traders Insurance Company in said California case; that the company demurred to the complaint of Hawley therein, but that the receiver had never entered an appearance or submitted to the jurisdiction of the Superior Court of California.

The amended and supplemental petition then prayed that upon the hearing thereof the said Hawley might be perpetually enjoined from prosecuting his attachment suit in California, or if the court should be of opinion that it ought not so to enjoin the prosecution of that action, an order should be entered directing that unless Hawley should dismiss his proceedings in California, he be barred in the Illinois case from sharing in the distribution of the assets of The Traders Insurance Company, and that pending the hearing of this amended and supplemental petition, the said Haw-

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ley be restrained from proceeding with his California suit.

At the hearing of the motion made for the said preliminary injunction April 11, 1907, the matters hereinbefore set forth were by affidavits and stipulation brought to the attention of the chancellor. It was also by affidavits shown that Hawley was never a resident of the State of Illinois, but for ten years had been a resident of California, and that he had not been, within a year preceding the hearing, within the limits of the State of Illinois. It was also shown by affidavits that the appearances of Hawley in the Illinois case were limited to those hereinbefore specifically set forth, and to motions by his solicitors on several occasions to vacate the orders enjoining him, and that Hawley did not enter any appearance in the cause on August 4, 1906 (as stated in the petition), and had never asked any relief of the Illinois court except the vacation of the orders against him.

After this hearing the chancellor entered the interlocutory injunction order first above set forth, from which this appeal is duly prosecuted under the statute.

HENRY R. PEBBLES and EUGENE H. GARNETT, for appellant; GEORGE C. SARGENT, of counsel.

ROSENTHAL & HAMILL, for appellee; CHARLES H. HAMILL, of counsel.

PER CURIAM. In our opinion the interlocutory injunction appealed from should be dissolved as improvidently and erroneously granted.

It is apparent that if a permanent injunction ought not to be granted on the petition involved, no preliminary one should be ordered. Such a permanent injunction is, the majority of the court think, prohibited by principle, expediency and authority. We are agreed in the belief, however, that the Circuit Court had the jurisdiction and the legal power to enter the order complained of. This makes it useless to comment upon

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the arguments made or suggested on either side orally or in the printed briefs concerning this element in the case. Whatever the misapprehension may have been under which the appellant's counsel may have labored concerning the appellant's previous appearance in the cause, it remains the fact that when appellant's general appearance was for the first time entered in it on August 6, 1906, the court was thereby given jurisdiction and power to determine upon the relative rights of the receiver and appellant under the petition then on file in the cause, and under the amended and supplemental one which thereafter took its place. It will not do to say that had the receiver in his original petition not made the mistaken statement that proofs of loss had been filed with him, the appellant would not have appeared. It was, after all, within the knowledge of the appellant whether or not he had filed his claim with the receiver, and his solicitor and counsel must be, in the eye of the law, credited with the same knowledge.

But that the court had jurisdiction and power to make the order of injunction does not imply its propriety or its freedom from error.

On principle it is objectionable, because it is the declared policy of the State of Illinois in similar cases to guarantee to its own citizens the right to pursue their remedies in the courts of Illinois to the exclusion of the claims of all foreign receivers or assignees. As we said in *Smith v. Berz*, 125 Ill. App. 122, p. 131, citing to the proposition *Heyer v. Alexander*, 108 Ill. 385, and comparing it with other cases on the same general subject in Illinois: "Neither a voluntary assignee nor one purely statutory from a foreign jurisdiction, nor a receiver appointed by a foreign court, can successfully hold property of which he has not obtained possession in the jurisdiction appointing him, against attaching creditors of the insolvent estate who are citizens of Illinois."

Why, then, should Illinois seek to deny to citizens

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of California the same right in the courts of California that it insists on retaining for its own citizens in the courts of Illinois? So to do is to violate the spirit, at least, of our national constitution, and to make an unwarranted distinction between the citizens of different states placed in precisely the same situation. It is not to the purpose to say that the courts of Illinois will prevent its own citizens from pursuing in other states remedies which are open to the citizens of those states under this rule, for that exercise of power depends on an entirely different principle, which recognizes the propriety of the tribunals of each state preventing an evasion of the law of that state by its own citizens, who owe it obedience and allegiance.

The reason in expediency for forbidding such an injunction as the present one is at least equally strong.

The injunction cannot be enforced if granted. Already the California court has repudiated the idea that comity demands of it the recognition of the receiver's claims as against Hawley's rights to pursue his remedy in it.

Hawley is not in this jurisdiction personally; he has, so far as appears, no property here; he has not been here for many months at least, and he is unlikely to come so long as the injunction is in force against him and he is violating it. There is no power which could be successfully invoked to carry out the mandate of the court. Why should a court of Illinois issue a *brutum fulmen*—a bull against the comet? Such an order, peremptory in its tone, but foredoomed in the knowledge of the judge who issues it, the parties it purports to affect, and the counsel who procure or oppose it, to disobedience and disregard, certainly does not add to that respect for the law and for the power and dignity of the courts which it is desirable to maintain and increase.

The authority of the only decided cases cited to us, which are strictly in point, is on the same side of the question. It is conceded by counsel for the appellee

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that the case of Carron Iron Company v. Stainton, 5 House of Lords Cases, 415, is distinguishable from the one at bar only in minor considerations, not in principle affecting the reasoning of Lord Chancellor Cranworth, who expressed the opinion of the majority of the Law Lords thus: "The Company" (*i. e.* the Scotch Company in question) "has real property in London and Liverpool and in the county of Cumberland. The question is whether this connection with England makes it fit that the courts should interfere to prevent the appellants from exercising their right of proceeding in the tribunals of their own country. I confess that I can discover no foundation for such a proposition. The circumstance that the appellants have property in this country which may be attached or sequestered enables the court to make any injunction it may issue effectual, but I do not see on what principle it can make the issuing of an injunction just or expedient, if it would have been unjust or inexpedient supposing there had been no property capable of being sequestered." \* \* \* \* "These decisions" (*i. e.* certain decisions cited in argument) "can only show by way of analogy (if indeed they do afford such an analogy) that service on the agent of the Carron Company in London would be good service on the company itself, though out of the jurisdiction. But they have no bearing on the question whether the equity sought to be enforced is one which can properly be applied toward a foreigner domiciled abroad. On these grounds I think that the court below ought not to have granted an injunction."

When the case went back to the Master of the Rolls, Sir John Romilly, it was decided that the applicability of the judgment of the House of Lords was not affected by an alleged submission of the appellants to the English Courts by proceedings begun in them in the meantime (*Stainton v. Carron Iron Company*, 21 Beavans Rep. 152), and this decision going to the Court of Appeals, *Stainton v. Carron Iron Company*,

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26 L. J. Rep. N. S. Ch. 332, was there affirmed, the Lord Chancellor saying: "I conclude that it must be a very strong case which would justify this court in restraining a foreigner domiciled in another country from proceeding to obtain the payment of debts according to the law of the country in which he is domiciled."

But more controlling on us than this case in the highest tribunals of Great Britain and the similar decisions in Crofton v. Crofton, 15 Law Rep. Ch. Div. 591, is the decision of the Supreme Court of Illinois in Western Union Telegraph Company v. Pacific and Atlantic Telegraph Company, 49 Ill. 90. In that case, although the Pacific and Atlantic Telegraph Company, a foreign corporation, had come into the courts of Illinois seeking relief in a matter to which the cross-bill of the Western Union Telegraph Company was plainly germane, the court refused the prayer of the cross-bill for an injunction against the Pacific and Atlantic Telegraph Company, forbidding it to attach its wires to the poles of the Western Union Telegraph Company in the State of Indiana, saying:

"The jurisdiction of our courts is only co-extensive with the courts of our state. They cannot legally send their process into other states and jurisdictions for service. If the exercise of such a jurisdiction were attempted and an injunction granted, and it should be disregarded by persons in Indiana, this court would be powerless to enforce the injunction by attachment, and hence the effort to exercise such a power would be readily defeated. But we are of the opinion that neither law nor comity between distinct state or national organizations sanctions the authority of one such body to exercise jurisdiction over the citizens and their property while both are beyond the jurisdiction of the tribunal in which the proceeding is pending. The courts of this state cannot restrain citizens of another state, who are beyond the limits of this state, from performing acts in another state or

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elsewhere outside of and beyond the boundary lines of this state. Any other practice would necessarily lead to a conflict of jurisdiction."

The opinion in *Barry v. Mutual Life Ins. Co.*, 2 New York Supreme Court Rep. 15, shows the Supreme Court of the State of New York in accord with this doctrine. So too, we think, were the Superior Court of New York City in deciding the case of *Hammond v. Baker*, 3 Sandford, 704, and Mr. Justice Brown, afterward of the Supreme Court of the United States, when in the U. S. Circuit Court for the Eastern District of Michigan, he rendered the opinion in *Kelley v. Ypsilanti Dress-Stay Manufacturing Company*, 44 Federal Reporter, 19.

We have fully in mind the distinctions which counsel for appellee insist exist between each of these cases and the one at bar, but they are forced to the statement that in the Illinois case the reasoning is, in their opinion, unsound, a proposition in which, as is shown by what we have already said, we do not concur, and which could hardly be allowed to govern our decision if we did. It is true that in the most technical sense in which they might be understood, the words which precede the excerpt we have quoted from the opinion—"This motion must be denied for want of jurisdiction," are not consistent with our holding about the power of the court in the case at bar, but the words were evidently not used in that strict sense. They mean, as the further explanation shows, that the courts of Illinois could not without error exercise such a power.

Neither the distinction argued from the fact that the Western Union Telegraph case in Illinois dealt with tangible property in the State of Indiana, nor the one sought to be deduced from the fact that the New York cases involved a proposed injunction against the prosecution of an action against the principal defendant instead of an attachment of choses in action in such a suit, commends itself to us. The principle

and reasoning of the cases cited seem to us to apply to the case at bar as strongly as though these differences did not exist. Our judgment, therefore, is that the order of the Circuit Court be reversed.

*Reversed.*

MR. PRESIDING JUSTICE BROWN dissenting.

I cannot agree with the majority of the court in this case. I have no criticism or comment to make on the reasoning by which they support their decision, but from a different point of view, there seem to me insuperable objections to the hypothesis that the conclusion to which they have come is in consonance with the policy of the State of Illinois concerning the relations of its own citizens to those of other states in controversies in its own courts.

The full statement of the law of Illinois in relation to the powers of foreign receivers in this state, as I conceive it to be from a comparison of all the cases on the subject decided by the Supreme Court of Illinois, is to be found in the opinion in *Smith v. Berz*, 125 Ill. App. 122, pp. 130-131, from which the opinion of the court quotes a single sentence. The whole statement is this: "A foreign receiver, or a foreign assignee, whose office and power are statutory and to whom no voluntary conveyance has been made, can not effectively convey real estate in Illinois, nor can he obtain the assistance of the courts of Illinois to secure the possession of chattels in this jurisdiction. If he has given no notice of his claim to debtors of the estate residing in Illinois, before a garnishment is made, he cannot defeat such garnishment by attaching creditors, either resident or non-resident of Illinois. But if without the aid of the Illinois courts, he has taken actual possession of chattels in Illinois, or has notified debtors of the estate residing in Illinois of his claim before an attachment is made, his claim (if it results from laws or proceedings not contrary to the public policy of Illinois) will be recognized and protected

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against such attachment *unless the attachment is by a citizen of Illinois.*

“As distinguished from a receiver or assignee purely statutory and appointed *in invitum*, a foreign voluntary assignee for the benefit of creditors, may have, in proper cases, the aid of Illinois courts to secure possession and control of property in Illinois conveyed to him, and *as against foreign attaching creditors*, he will be protected in his right to all the property in Illinois of which he does obtain possession. But neither a voluntary assignee nor one purely statutory from a foreign jurisdiction, nor a receiver appointed by a foreign court, can successfully hold property of which he has not obtained possession in the jurisdiction appointing him, against attaching creditors of the insolvent estate *who are citizens of Illinois.*”

This statement of the law of Illinois shows how carefully the courts of Illinois protect the claims of the citizens of Illinois as compared with claims equally valid in justice and equity of citizens of other states, and to what extent they prefer the citizens of Illinois in their administration of the law in relation to receiverships. When, with this as a starting point, we proceed to the propositions that the courts of Illinois would, as it is conceded by counsel for appellants they would, issue an injunction exactly like the one involved here against any citizen of Illinois who should bring in California such an attachment suit as the appellant brought here (Sercomb v. Catlin, 128 Ill. 556), and that this would be no violation of the Federal Constitution (Cole v. Cunningham, 133 U. S. 107), the conclusion is irresistible to my mind that the legal policy of the State of Illinois is to treat the citizen of California no better in this regard than the citizens of Illinois. If he voluntarily comes into the jurisdiction of the courts of Illinois, they will, so far as their power goes, deprive him of any advantage he may, by reason of his citizenship in another state, have over the citizens of our own state. It seems to me that in this contro-

versy the receiver must be held to represent the rights and interests of the citizens of Illinois, intermingled, as they certainly are, however, with the rights and interests of citizens of many other states.

I do not think the *ratio decidendi* of Sercomb v. Catlin, *supra*, is in the allegiance which citizens of Illinois are bound to render to her laws, institutions and courts, and from which the citizens of California are excused, as appellant argues, but, rather, in the very tender regard of the courts of Illinois, not based on altruism, or patriotism, but developed purely by local self-interest, for the pecuniary and personal rights of the citizens of Illinois.

It is true that the injunction granted cannot be enforced except in Illinois. But it certainly is an advantage to the citizens of Illinois interested in the receivership to place such a prohibition on the pursuit of an unequal advantage in California as will put the person insisting on it in contempt of the Illinois court if he proceeds in California and thereby shut him off completely, unless he purges himself from that contempt, from participating in the results of the Illinois receivership, nor can it be judicially presumed that no other means of punishing the violation of the injunction would ever be available within the limits of Illinois.

The cases cited in the opinion of the court are undoubtedly in point, but the English cases arose where no such system of inter-relation between the citizens of different states exists, as here, and where no such complex theory of the law concerning receiverships and claims against estates in the custody of the law has been declared as is indicated in the quotation made from Smith v. Berz, *supra*.

The authorities from other states are not necessarily controlling. The policy of the State of Illinois is declared by its own courts.

The case of Western Union Telegraph Company v. The Pacific and Atlantic Telegraph Company, 49 Ill. 90, remains. It is the most serious difficulty I find in

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the maintenance of the views I express, but it was decided in 1868, long before the policy of the state was declared as to the rights of its own citizens in insolvent and other law administered estates by the series of cases cited in *Smith v. Berz*, *supra*, beginning with *Rhawn v. Pearce*, 110 Ill. 350, and ending with *Townsend v. Coxe et al.*, 151 Ill. 62, and also long before in *Sercomb v. Catlin*, 128 Ill. 556, the Supreme Court had decided that it was proper to enjoin a citizen of Illinois from pursuing a remedy against such an estate in a foreign tribunal. I cannot think, therefore, that it should now be considered controlling in the decision of cases like the one at bar.

The argument *ab inconvenienti* in the present case is very strong. It should not by itself, perhaps, be held to be of chief importance. But in connection with the considerations I have set forth, it leaves me in no doubt that the order granting the injunction should have been affirmed.

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### Alexander Despres et al. v. Samuel Folz.

Gen. No. 13,086.

1. *BOND—when sufficiently identifies contract which it is given to secure.* A bond which recites that the principal has entered into a contract with respect to a particular matter, is sufficient, where the contract in question is consistent with such reference, notwithstanding it may, in its scope, be broader than such reference.

2. *BOND—what change in principal's undertaking releases surety.* A surety is released from a bond given to secure the faithful performance of a contract of service where the contract in question provided that the principal should be paid a weekly salary, which was to be remitted to the surety, if a change is made, without the surety's consent, in the manner of the principal's compensation and in the method of doing business so that the risk of the surety is increased.

Action of debt upon bond. Error to the Circuit Court of Cook county; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Affirmed. Opinion filed May 28, 1907.

**Statement by the Court.** This is a suit upon a bond, the condition of which is thus stated:

"The condition of the above obligation is such that whereas, said Sig. Folz has contracted to act as salesman in the employ of said Despres & Company and it is contemplated that among the duties of his employment he may from time to time collect or otherwise receive moneys or other property belonging or due to said Despres & Company;

"Now therefore, if the said Sig. Folz shall from time to time, when so requested by said Despres & Company, and also at all other times when he ought properly to do so, account for, pay and deliver over to said Despres & Company all moneys and property so collected or received or otherwise coming into his possession and belonging or due to said Despres & Company, then this obligation to be null and void, otherwise to remain in full force and effect."

It is signed by Sig. Folz as principal, Samuel Folz and nine others as sureties, of whom Samuel Folz alone was served with process. In addition to pleas afterward withdrawn or ruled out on demurrer, defendant filed three special pleas to which plaintiffs' demurrers were overruled. The substance of these pleas, with additional matter, was subsequently embodied in an additional plea, the material part of which is as follows: that on, to wit: August 21, A. D. 1899, and before the execution of said writing obligatory in plaintiffs' declaration mentioned, said Sig. Folz contracted in writing with said plaintiffs to enter their employ as salesman at a fixed salary of sixty-five (\$65) dollars per month; that said written contract of employment between said Sig. Folz and the plaintiffs provided that plaintiffs were to remit each week all the salary earned by said Sig. Folz under said contract of employment, to the defendant Samuel Folz, and further provided that said Samuel Folz was to have at all times the privilege of a general supervision of any business transactions by and between said Sig. Folz and the plaintiffs; that he, Samuel Folz, accepted said contract of employment by his written

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indorsement thereon, and signed said written indorsement with the full knowledge and consent of said Sig. Folz and said plaintiffs and by said written indorsement became a party to said contract of employment and all the provisions thereof; that said defendant entered into the said writing obligatory for the purpose of securing the performance on the part of the said Sig. Folz of said written contract of employment, and that the provisions for the payment of the salary earned by said Sig. Folz to defendant, Samuel Folz, and giving to said Samuel Folz the privilege of a general supervision of all business transactions between said Sig. Folz and plaintiffs were inserted in said contract of employment for the purpose of securing said Samuel Folz against loss as surety on said writing obligatory.

And defendant Samuel Folz alleges that the contract of employment referred to in the condition of said writing obligatory was and is the said contract of employment in writing between said Sig. Folz and plaintiffs aforesaid; that the manner of compensating said Sig. Folz under said written contract of employment was at the time of the execution by him, said defendant, of said writing obligatory, known to said defendant, and was communicated to him by plaintiffs, and was one of the considerations which induced him to enter into and execute said writing obligatory; that after the making and execution of said writing obligatory by Samuel Folz as aforesaid and on, to wit: January 9th, A. D. 1901, and before the defaults, or any of them, by the said Sig. Folz complained of in plaintiffs' declaration, said plaintiffs and said Sig. Folz by mutual consent, and without the consent or knowledge of defendant Samuel Folz, terminated and abolished said written contract of employment and then and there entered into a new and different contract of employment, whereby said Sig. Folz was thereafter to be paid by plaintiffs, in lieu of a fixed salary as provided in said original written contract

of employment, a commission or percentage on all sales made for plaintiffs by said Sig. Folz; that said new contract of employment contained no provision for the payment to said defendant Samuel Folz of the salary or commission earned by said Sig. Folz, as was provided in said original written contract of employment, nor any provision giving defendant Samuel Folz the privilege of a general supervision of all business transactions between plaintiffs and said Sig. Folz.

And defendant Samuel Folz further alleges that none of the defaults by said Sig. Folz, as complained of in plaintiffs' declaration, occurred before the said change in said contract of employment as aforesaid; that after the said change said Sig. Folz made numerous and divers fictitious sales for the purpose of securing his commissions thereon; that he directed the goods so sold shipped to divers fictitious persons in care of himself, and upon their arrival disposed of them to his own use, all of which fictitious sales and deliveries as aforesaid were made possible by the change in said contract of employment, whereby the risks of said Samuel Folz upon said writing obligatory were materially altered and increased, whereby defendant Samuel Folz became discharged from all liability under said writing obligatory.

A demurrer to this plea having been overruled, plaintiffs elected to abide by the demurrer, and judgment *nil capiat* and for costs was entered against them. From this judgment plaintiffs appeal.

WEISSENBACH & MELOAN, for plaintiffs in error.

CASTLE, WILLIAMS, LONG & CASTLE, for defendant in error.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The question presented by this record is whether the pleas, demurrers to which were overruled, set up a good defense to the plaintiffs' action upon the bond.

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The additional plea sets up a written agreement made some months prior to the execution of the bond sued upon. The only words in the bond descriptive of a contract are found in the recital of the condition, viz.: "Whereas said Sig. Folz has contracted to act as salesman in the employ of said Despres & Company." The terms of the contract of employment, and whether written or verbal, the bond does not state. Plaintiffs contend that the real question in the case is whether this is a suit upon a bond that is complete in itself or a suit upon a bond to secure the performance of some other contract, and it is urged the bond does not contain a clear reference to a then existing and definite contract, but is complete in itself.

There is no doubt the words "has contracted to act as salesman in the employ," etc., refer to a contract, either verbal or written. It is equally true, however, that the written contract set up in the plea contains more than a mere contract to act as salesman. Its first clause is a complete contract of employment in that capacity. The plea states that "Sig. Folz contracted in writing with said plaintiffs to enter their employ as salesman at a fixed salary of sixty-five dollars per month." This corresponds with the reference in the bond. There are, however, additional provisions of the alleged contract as set up in the plea, not necessarily a part of a contract "to act as salesman." The first of these is to the effect that the employers were to pay the employe's salary to one of the bondsmen, the defendant herein; the second, that said bondsman was to have at all times supervision of the business transactions between the employers and the employe; and it appears that said defendant himself was, as he claims, a party to the contract which he says he accepted by his written endorsement thereon.

In Stearns on Suretyship, sec. 143, cited in behalf of plaintiffs, it is said: "A bond is executed to secure some other contract between the principal and the ob-

lige. The terms of that contract are a necessary part of the bond, and for convenience as well as to avoid mistake in the exact terms of the obligation assumed, it is usually deemed sufficient to incorporate the main contract in the bond by reference, thus making it part of the bond, the same as if fully set out. A mere reference, however, without reciting in the bond the substance of the contract referred to, would be void for uncertainty, such as a reference to a building contract, and the plans and specifications, without designating other facts to identify what building is referred to. If the main contract is broader in its scope than the limits fixed in the bond, a reference to the contract will only incorporate so much of the same as is within the limits of the terms of the bond."

Plaintiffs' claim is that the contract described in the plea "is broader in its scope" than the limits of the contract of Sig. Folz to act as salesman, as fixed in the bond; that the reference to such contract in the bond, incorporated therein only so much, if any, of the contract set up in the plea "as is within the limits of the terms of the bond." It is urged that the one point to be determined is, "does the word 'contracted' used in this bond incorporate some other distinct and independent contract made by the parties, into the bond, and did the sureties upon this bond bind themselves to the performance of such other and independent contract, or is the bond complete in itself;" that a prior or contemporaneous contract cannot be read into a bond unless the bond by some apt reference identifies the contract and that parol evidence is not admissible to connect the two; that it would require parol evidence to identify the contract alleged to be in writing set up in the plea with the mere contract to act as salesman described in the bond sued upon, and that the bond is complete in itself without reference to any outside agreement, verbal or written. In support of their views plaintiffs cite *Domestic Sewing Machine Co. v. Webster*, 47 Iowa, 357, in which it

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was held that the bond and agreement were independent of each other and parol evidence was not admissible to show that the surety's liability was measured by the agreement. In that case, however, there was no reference in the bond, as there is in the case at bar, to the agreement sought to be connected with it, and which the court said was "quite different from the one which upon the face of the bond" the defendant "appears to have assumed." It was held that the two had "no necessary relation to or dependence upon each other." Hence it was said that "if any relation exists between them it must be established by parol testimony," which would, it was said, violate the rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." In the present case a contract of Sig. Folz to act as salesman for plaintiffs is expressly referred to in the bond and such contract corresponds in all respects to that extent with the written contract set up in the plea. A relation is therefore established by the terms of the instruments between the written contract and the bond. The other provisions of the written contract are in no sense inconsistent with the bond although not essential to a mere contract of employment. Nor do any of the provisions of the written contract vary the terms of the bond nor tend to enlarge its scope. Parol evidence to identify the written contract as the one referred to in the bond would not tend to vary the terms of the writing obligatory nor to enlarge the liability under it. In Am. & Eng. Ency. of L. (vol. 21, p. 1116) it is said, with numerous citations, that "where a written agreement refers to another writing, parol evidence is admissible to identify the writing referred to and thus to connect the two instruments. The cases go even further than that, for where a reference is found to something which may be either a conversation or a written document, evidence is admissible to show which it is, and if it is proved to be a written document, it may be put in

evidence and so connected with the one already admitted or proved. And when papers thus connected and read together show a complete and unambiguous agreement, they must speak for themselves and the agreement which they disclose cannot be varied or contradicted by parol evidence." We are of opinion that in the case at bar parol evidence could be admitted in support of the allegation of the plea, that the contract referred to in the bond is the written contract set out in the plea.

The contract of employment referred to in the bond having been disclosed by the additional plea, did the change in the mode of compensation of the employe from payment of a fixed salary to payment by commission on sales averred in the plea discharge the defendant as surety under the bond? The reasonable construction of the bond in the light of the written contract is that the defendant would be liable for the defaults of the principal so long as the latter's weekly salary fixed in the contract was remitted to the defendant and he was permitted to have supervision of the business transactions between his principal and the plaintiffs. To hold the defendant liable, when by the change in the principal's compensation and in the method of doing business whereby the principal was tempted and enabled to make fictitious sales and deliveries of goods, free from defendant's supervision, the latter's risk was obviously increased, "would be to enlarge the undertaking of the sureties which the law will not permit." *Burlington Ins. Co. v. Johnston*, 120 Ill. 622-626; *Sewing Machine Co. v. Langham*, 9 Bissell, (U. S.) 183-186. We do not regard *Amicable M. L. I. Co. v. Sedgwick*, 110 Mass. 163, and *Sanderson v. Aston*, 8 Excheq. cases, 73, as in point.

For the reasons indicated, we are of opinion the demurrer to the additional plea was properly overruled. The judgment of the Circuit Court will therefore be affirmed.

*Affirmed.*

Ray v. Keith.

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**Susan C. Ray et al. v. Susan Keith et al., Executors.**

(Gen. No. 13.115.

1. **NEW CAUSE OF ACTION**—*when amended affidavit in attachment does not set up.* An amended affidavit in attachment, setting up grounds of attachment which existed at the time of the issuance of the attachment, does not set up a new cause of action.

2. **INTERPLEA**—*what does not establish.* A conveyance of realty subject to an attachment does not confer such an interest that the same will become paramount to the attachment lien upon the filing of an amended affidavit in attachment without which the attachment could not have been sustained.

**Attachment.** Error to the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Affirmed. Opinion filed May 28, 1907.

**Statement by the Court.** Defendants in error began an action of debt against one Moses A. Thayer October 3, 1898, in the Superior Court and filed their declaration the 11th of the same month. December 19th the plaintiffs sued out an attachment in aid upon filing bond and affidavit pursuant to the statute. January 4, 1899, the defendant in that suit filed a plea traversing the affidavit in attachment. December 30, 1899, plaintiff in error Susan C. Ray filed her interplea claiming the property attached. February 24, 1900, the plaintiffs in that suit—defendants in error here—recovered judgment against the defendant Thayer in the original action in debt for \$6,940.84 damages. Thayer died July 22, 1901, and the administrator of his estate was substituted as defendant. May 14, 1900, a final order was entered overruling a demurrer filed by the interpleader Susan C. Ray to the plaintiffs' amended additional replication and, the interpleader electing to stand by her said demurrer, judgment was given in favor of the plaintiffs to the effect that at the time of the issue and levy of the writ of attachment the realty so attached and levied upon was not as against said plaintiffs the property of said

interpleader. This judgment was ultimately affirmed by the Supreme Court. The facts are set forth in the report of that case. Ray v. Keith, 218 Ill. 182.

Upon January 6, 1905, the attachment issue came on for trial, and plaintiffs were allowed to file an amended affidavit in attachment, over objection of defendants' attorneys. The same day Susan C. Ray and others filed a joint and several motion in writing for leave to file an interplea *instanter* pursuant to the statute. The motion was denied, and to this denial the parties excepted.

The defendant in the attachment is not complaining of any error in the proceedings. The interpleaders prosecute this writ of error.

BOLEN & STEWART, for plaintiffs in error.

BAYLEY & WEBSTER, for defendants in error.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The only question presented for determination is whether the Superior Court erred in denying the motion of plaintiffs in error for leave to file on January 6, 1905, what was, as to Susan C. Ray at least, a second interplea.

By that interplea it was sought to set up an interest in the property attached, claimed to have been acquired by plaintiffs in error, Bolen and Stewart, under an assignment dated November 21, 1903, in which Susan C. Ray and others conveyed an undivided fifteenth interest in said property to said Bolen and Stewart in consideration of legal services rendered and to be rendered in this case and other litigation then pending in Cook county. The interplea sets forth a second time "that the realty attached and levied upon by virtue of the writ of attachment in this behalf was at the time thereof the property of said Susan C. Ray and so remained until November 21, A. D. 1903, when the said Susan Ray, for a valuable con-

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sideration made, executed and delivered the certain instrument in writing, a copy of which is hereto attached \* \* \* and made a part hereof and from hence hitherto became, was and remained the property of these interpleaders and was not the property of the said Moses Thayer," defendant in the attachment. This is the precise contention made in the original interplea of said Susan C. Ray filed December 30, 1899, disposed of by the judgment of the Superior Court May 14, 1900, finding that at the time of the issue and levy of the attachment writ December 19, 1898, said property was not as against defendants in error the property of the interpleader, Susan C. Ray. This judgment was affirmed by the Supreme Court October 24, 1905, and a rehearing was denied December 12th following. Ray v. Keith, 218 Ill. 182. If as against defendants in error, Susan C. Ray had no interest in the property December 19, 1898, when the attachment writ was issued and levied, it is difficult to see how she could convey any such interest to the other plaintiffs in error November 21, 1903, as against the same defendants in error.

It is, however, contended by plaintiffs in error that when the court permitted a new or amended affidavit for attachment to be filed January 6, 1905, setting up additional grounds of attachment, the filing of such amended affidavits was an institution of a new suit, and that therefore plaintiffs in error became entitled to interplead. The new or amended affidavit in addition to the averment contained in the original affidavit that the attachment defendant, Moses A. Thayer, at the time of the issuing of the writ of attachment concealed himself or stood in defiance of an officer so that process could not be served upon him, set forth that said Thayer had within two years fraudulently conveyed or assigned his effects or a part thereof so as to hinder and delay his creditors, had fraudulently concealed or disposed of his property and was about fraudulently to conceal, assign or otherwise dispose of

his property or effects so as to hinder or delay his creditors. The attachment debtor, Thayer, had died July 22, 1901, pending the attachment suit, before it came to trial and before the filing of the amended affidavit. The contention is that the additional grounds for attachment set up in the amended affidavit constituted an "entirely fresh cause of action," since without such additional grounds the attachment could not have been sustained.

We are unable to concur in this contention. The statute provides (chap. 11, sec. 28) that no writ of attachment shall be quashed nor the property taken restored on account of any insufficiency of the original affidavit, writ of attachment or attachment bond if the plaintiff or some credible person for him shall cause a legal and sufficient affidavit or attachment bond to be filed or the writ to be amended in such time and manner as the court shall direct. In that event the cause shall proceed as if such proceedings had originally been sufficient. In *Bailey v. Valley Nat. Bank*, 127 Ill. 332-336, a motion to strike out the affidavit for attachment was held properly overruled where "under leave of the court the plaintiff filed an amended affidavit setting forth with sufficient clearness the nature and amount of the indebtedness claimed to be due and two sufficient grounds of attachment and an amended bond." In *Hogue v. Corbit*, 156 Ill. 540-544, the affidavit was held to be amendable. Such amended affidavit may be filed after the death of the defendant in attachment. R. S. chap. 1, sec. 11, Amendments and Jeofails; R. S. chap. 11, sec. 3; *Dow v. Blake*, 148 Ill. 76-89, citing *Davis v. Shapleigh*, 19 Ill. 386; *Weare Commission Co. v. Druley*, 156 Ill. 25-28. The amended affidavit in controversy did not purport to set up any new cause of action arising subsequent to the issue of the attachment writ. The additional grounds of attachment shown by the amendment were grounds which existed at the time the attachment issued, and it was clearly within the

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proper scope of an amendment to the original affidavit to include these additional grounds. If the grounds of attachment stated in the original affidavit were insufficient to sustain the writ, the statute expressly provides that the writ shall not "be quashed, nor the property taken thereon restored" because of such "insufficiency of the original affidavit," in case a legal and sufficient affidavit shall be filed; and thereafter the cause proceeds as if such affidavit "had originally been sufficient." There was therefore no new suit, no new cause of action, and there was no new writ of attachment. There was an amended statement showing additional grounds existing at the time of the attachment, but which had been omitted in part from the original affidavit. Since the property taken on the writ could not be restored because of insufficiency in the original affidavit when such insufficiency was cured by amendment, it is difficult to see how any new rights of third parties could have intervened by reason of the assignment from Susan C. Ray set up in the new interplea sought to be filed. There was here no question of innocent purchasers, no new rights had been acquired by Susan C. Ray and she conveyed none. The only question which could have been raised by the second interplea would have been the right of property at the time of the attachment and this had been determined upon the first interplea.

Finding no error the judgment of the Superior Court will be affirmed.

*Affirmed.*

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**Alice C. Forsyth v. Chicago Union Traction Company.**

Gen. No. 12,525.

CONTRIBUTORY NEGLIGENCE—attempt to alight; when not, as matter of law. In this case the following instruction was given:

"The court instructs the jury that if you believe from the evidence, under the instructions of the court, that the plaintiff voluntarily attempted to alight from said car at the time and place in

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question, then the plaintiff cannot recover and you should find the defendant not guilty."

*Held*, that it was error to give such instruction, in that it was for the jury to determine whether or not the attempt to alight referred to in the instruction was or was not ordinary care when considered with respect to all the facts and circumstances in evidence.

Action in case for personal injuries. Error to the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Reversed and remanded. Opinion filed May 28, 1907.

**Statement by the Court.** Plaintiff in error brought an action on the case against defendant in error to recover damages for personal injuries alleged to have been sustained by her while a passenger on one of its cars. The second count of the declaration alleges that while plaintiff was a passenger upon an electric street car of defendant, exercising ordinary care for her own safety, an explosion occurred on said car, caused by the carelessness and negligence of the defendant, causing a loud report and a large amount of flame and smoke in said car, which explosion, flame and smoke caused a panic among the passengers in said car, by reason of which they made a rush for the rear door and platform of said car, and while plaintiff attempted to escape from danger, she was thrown from the car to the ground and injured, etc. The car was a closed car with seats running lengthwise and an aisle or passage between the seats. The controller was on the front platform. While running at the rate of six or seven miles per hour, there was a sudden flash and noise from the controller and flame shot out of it to the height of six or seven feet. A panic ensued among the fifteen or twenty passengers in the car and they rushed out onto the rear platform.

Plaintiff testified that the smoke and flames came into the car; that she was thereby very much scared and followed the crowd out to the rear platform, forgetting in her fright her two small children who were with her in the car; that she heard her children

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scream, tried to reach them and they tried to get out to her, and that while she was trying to reach her children she was pushed off the car backwards and injured.

The testimony for the defendant tends to show that plaintiff was not pushed off the car, but voluntarily stepped or jumped from it.

JOHN F. WATERS and C. H. JOHNSON, for plaintiff in error.

JOHN A. ROSE and ALBERT M. CROSS, for defendant in error; W. W. GURLEY, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

The principal contention of plaintiff in error is that the court erred in giving for the defendant the following instruction: "The court instructs the jury that if you believe from the evidence, under the instructions of the court, that the plaintiff voluntarily attempted to alight from said car at the time and place in question, then the plaintiff cannot recover and you should find the defendant not guilty."

To attempt means: "to make an effort to effect or do, \* \* \* to try with some effect." Century Dictionary.

Plaintiff testified that when she heard the explosion and saw the smoke and flames, she left her seat, rushed out on the rear platform; that when she got there she heard the cries of her children and tried to reach them. True, she does not in terms state that she rushed out on the platform for the purpose of leaving the car, but the jury might properly, from her acts, infer such a purpose, and if she went out on the rear platform for the purpose of leaving the car, then such act amounted to and was an attempt on her part to leave, to alight from the car. This instruction makes the mere attempt to leave the car fatal to plaintiff's right to a verdict. To make such an attempt on the

part of the plaintiff fatal to her right of recovery, it must appear both, that such attempt was a failure on her part to exercise reasonable care for her own safety, and that such attempt caused or contributed to cause the injury complained of.

It was plaintiff's duty at all times and under all circumstances to exercise ordinary care for her own safety, and if her failure to exercise ordinary care caused or contributed to her injury, she cannot recover. What is ordinary care under given facts or circumstances is a question of fact. Conduct which under ordinary circumstances would amount to and be negligence may not be inconsistent with the exercise of ordinary care on the part of a person who is suddenly confronted with imminent danger, or with supposed danger, if the facts and circumstances are such as create and justify the belief that danger is real and imminent. It was a question for the jury, under the evidence in this record, whether plaintiff's attempt to leave the car, if she did attempt to leave it, was a failure on her part to exercise ordinary care, but this instruction told the jury to find the defendant not guilty, if from the evidence they believed that she voluntarily attempted to leave the car.

In our opinion it was reversible error to give such instruction, and the judgment will be reversed and the cause remanded.

*Reversed and remanded.*

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### Frank H. Cumming v. Harry W. Sisson.

Gen. No. 18,106.

1. JUSTICE OF THE PEACE—*when Circuit Court acquires jurisdiction of appeal from.* Where the successful party before a justice is a non-resident all that is necessary to give jurisdiction to the Circuit Court to hear and determine the appeal (the appeal having been taken before the clerk of such Circuit Court), is that two appeal summonses shall have been issued to the sheriff of the

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county in which the suit was brought and two returns "not found" be made.

2. **JUSTICE OF THE PEACE—what proper part of record of Circuit Court in appeal from.** The affidavit, writ and bond in an attachment suit instituted before a justice become a part of the record in the appeal from such justice, even though filed after the term at which judgment is rendered upon the appeal; and the fact that such papers were not on file at the time of the hearing of the appeal is a mere irregularity, not affecting the jurisdiction to hear and determine the appeal.

Action commenced before justice of the peace. Error to the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Affirmed. Opinion filed May 28, 1907.

**Statement by the Court.** October 30, 1899, plaintiff in error filed an affidavit before a justice of the peace of Cook county for a writ of replevin and procured a writ, which he delivered to a constable and gave to the constable a bond. The constable executed the writ by taking the property described therein and delivering the same to the plaintiff, and made due return of his bond and writ to the justice, with a return of "not found" as to the defendant. November 11th, the case was tried by the justice and judgment entered for the plaintiff. December 1st, defendant filed his appeal bond in the Circuit Court and a writ of *supersedeas* was issued, which was served on the justice December 4th.

September 22, 1902, a transcript of the judgment before the justice was filed in the Circuit Court and summons for defendant issued to the sheriff of Cook county, which was returned, "not found." October 24, 1902, an *alias* was issued upon which the same return was made.

October 18, 1905, the cause was tried by a jury and a verdict returned for the plaintiff and judgment entered thereon. The judgment entry recites that: "the plaintiff came and the defendant did not come," etc.

November 4, 1905, this judgment was vacated and a new trial granted on motion of defendant; the order

containing a finding that on October 13th, the defendant came and the plaintiff did not come, and that by mistake, and contrary to the evidence, a verdict for the plaintiff was returned and judgment entered thereon.

November 30, 1905, the case was again tried, the defendant only appearing. The verdict found the right of possession, in the property taken on the writ, in defendant, and assessed his damages for the use thereof, etc., at \$250 upon which verdict the judgment here sought to be reversed was entered. After the expiration of the term at which judgment was so entered, plaintiff moved to quash an execution which had been issued on said judgment and to set aside the judgment, upon the ground that the summons and *alias* summons had been issued to the sheriff of Cook county when the plaintiff, as the defendant knew, resided in Livingston county, and that plaintiff had no notice of such appeal, etc. Before said motion was heard, plaintiff, by leave of the court, filed an additional motion to set aside said judgment, for the reason that the Circuit Court was without jurisdiction in the cause.

February 10, 1906, said motions were denied. Up to this time, the affidavit, writ of replevin and replevin bond had not been filed in the Circuit Court, but the same were filed March 10, 1906, and appear in the transcript of the record filed in this court by plaintiff in error.

MANN & MILLER, for plaintiff in error.

PHELPS & CLELAND, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Plaintiff in error contends that the judgment should be reversed for the following reasons: First, the Circuit Court was without jurisdiction of said cause, for the reason that it did not affirmatively appear from the papers on file in that court that the justice of the peace

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had jurisdiction thereof; and second, because appellant in the Circuit Court caused summons to issue to the county of Cook when in fact the appellee resided in Livingston county and the place of residence of said appellee was well known to the appellant.

It appears from the affidavits filed in support of the motion that plaintiff has, since the suit was begun, resided in Livingston county, and that this was known to defendant.

Plaintiff brought this suit before a justice of the peace of Cook county. The appeal summons and *alias* were issued to the sheriff of that county. The defendant had the right to appeal by filing his bond with the justice and when an appeal is thus taken, no summons issues for the appellee. He also had the right to appeal, as he did in this case, by filing his bond in the office of the clerk of the Circuit Court. The statute provides that when an appeal is so taken, "the clerk shall issue a *supersedeas* \* \* \* and he shall issue a summons to the appellee," etc. R. S., chap. 79, sec. 115.

The statute further provides that when the appeal is taken by filing the bond with the clerk of the Appellate Court and summons and *alias* have been issued for the appellee and returned, "not found; it shall be lawful for the Appellate Court to proceed and try the appeal as if the appellee had been duly served with process." *Id.* sec. 177.

The statute makes no provision for issuing an appeal summons to a foreign county. All that was required of the appellant was to file his appeal bond with the clerk. Upon the filing of such bond, it became the duty of the clerk to issue an appeal summons. The plaintiff brought his suit before a justice of the peace of Cook county, and we think that the appeal summons and *alias* were properly issued to the sheriff of that county, and that the Circuit Court acquired jurisdiction of the appellee by the returns of "not found" of such summons and *alias*.

The affidavit, writ of replevin and bond became a part of the record of the cause in the Circuit Court when filed therein, although not filed until a term subsequent to that at which the judgment was entered. *Leiferman v. Osten*, 167 Ill. 93.

There was in this case before the justice an affidavit, writ of replevin and bond, and he had jurisdiction of the subject-matter and of the plaintiff. The filing of the appeal bond by the defendant gave the Circuit Court jurisdiction of the defendant, although he had not been served before the justice. The filing of the appeal bond and transcript gave the Circuit Court jurisdiction of the subject-matter. The issuing of the appeal summons and *alias* and the returns of "not found" gave that court jurisdiction of the plaintiff.

The failure of the justice to send up, with the transcript, the affidavit, writ and bond did not affect the jurisdiction of the Circuit Court, and the proceeding to trial in that court, without such affidavit, writ and bond being on file, was but an irregularity which was waived by the plaintiff by his failure to object to proceeding to trial without them. *Leiferman v. Osten*, *supra*.

In that case the distinction is pointed out between cases where the record wholly fails to show that any complaint or affidavit was filed before the justice in a case where such complaint or affidavit is necessary to give him jurisdiction of the subject-matter and cases where the record shows that all the papers necessary to give the justice jurisdiction were before him, but were not transmitted to the Appellate Court until after the trial of the appeal in that court.

We find in the record no reversible error, and the judgment of the Circuit Court will be affirmed.

*Affirmed.*

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**William H. Temple v. Anna H. Temple.**

Gen. No. 18,128.

**DECREE—when findings of, sufficient to support.** A decree in chancery entered in a cause in which there were no depositions, no master's report and no certificate of evidence, is sufficiently sustained by its recitals where it finds that the cause was heard upon bill, answer, replication and proofs taken and that "the allegations and each and all of them in the bill contained are true as stated therein," etc.

SMITH, J., dissenting.

Separate maintenance. Error to the Circuit Court of Cook county; the Hon. JOHN L. HEALY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Affirmed. Opinion filed May 28, 1907.

JOHN J. BEILMAN, for plaintiff in error.

BERNHARDT J. FRANK, for defendant in error; L. M. ACKLEY, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

In a suit in equity brought by a wife against her husband for separate maintenance there was a decree in favor of the wife, to reverse which the defendant prosecutes this writ of error. The defendant answered the bill admitting the marriage and cohabitation, and denying all the other allegations of the bill, to which answer a replication was filed.

There is in the record no deposition, master's report or certificate of evidence. The decree recites that the cause was heard upon bill, answer, replication and the proofs taken in the cause, and contains only the following finding: "The court doth find that the allegations and each and all of them in the bill contained are true, as therein stated, and that the equities of this cause are with the complainant."

The sole ground of reversal urged is, that the finding above set forth is not sufficient to sustain the decree.

The statute permitting oral evidence to be heard in chancery was first enacted in 1849. Since that time the Supreme Court has repeatedly held that to sustain an affirmative decree in chancery on appeal, or writ of error, where there is in the record neither depositions nor master's report, there must be either a certificate of evidence or the decree must contain a finding of facts sufficient to sustain it.

It was said in *Standish v. Musgrove*, 223 Ill. 500, 504, that in the absence of any evidence in the record, "the decree must specifically find the facts that were proved on the hearing. This is the reverse of the rule at law. *Ryan v. Sanford*, 133 Ill. 291; *Marvin v. Collins*, 98 *id.* 510, 511." In *Standish v. Musgrove* there was no finding of facts. In *Ryan v. Sanford* the bill was dismissed for want of equity and the complainant appealed. There were in the record certain depositions, and the question was, whether such depositions made a case which entitled complainant to the relief prayed in his bill, and it was held that they did not.

In *Marvin v. Collins*, the decree found certain specific facts only, and the question was, whether the facts so found were sufficient to sustain the decree, and it was held that they were not.

In none of the cases above referred to was the question presented whether a finding that all of the allegations of the bill are true, was a sufficient finding of facts to sustain a decree. So far as we are advised, that question has not been presented to the Supreme Court.

The language of an opinion is to be construed with reference to the facts and the questions presented in the case in which such language is used.

In *Adamski v. Wieczorek*, 93 Ill. App. 357, it was held that such finding was insufficient and the decree was reversed. The only case cited in the opinion in support of the ruling was *Glos v. Beckman*, 183 Ill. 158. In that case there was a certificate of evidence, certifying that it contained all the evidence heard upon the hearing of the case, and the decree was reversed be-

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cause there was no evidence tending to prove a material fact.

In Schmid v. Schmid, 60 Ill. App. 174, such finding was held sufficient, and the decree was affirmed, Mr. Justice Cartwright dissenting. The only case cited in the dissenting opinion was Marvin v. Collins, *supra*, in which, as has been said, there was a specific finding of facts and the question now before us was not presented.

Section 18 of the present Chancery Act was section 19 of the Chancery Act in the R. S. of 1845, and under that section, in an ordinary chancery case, where the bill is taken as confessed, neither certificate of evidence nor finding of facts is necessary to sustain the decree on error or appeal, for it cannot be assigned for error that the averments were not proved. Manchester v. McKee, 4 Gil. 510; Farnsworth v. Strasler, 12 Ill. 482.

Since 1845, the statutes of this state have contained the following provision in relation to divorce cases: "If the bill is taken as confessed, the court shall proceed to hear the cause by the examination of witnesses in open court, and in no case of default shall the court grant a divorce unless the judge is satisfied that the cause of divorce has been fully proved by reliable witnesses." R. S. 1845, 197, sec. 5; R. S. 1874, chap. 40, sec. 8.

This act permitted oral testimony in divorce cases where the bill was taken as confessed. The Act of 1849 permitted oral testimony in all chancery cases. Under the Divorce Act, a court is not authorized to decree a divorce unless evidence is heard, "and the cause of divorce fully proved."

In Hawes v. Hawes, 33 Ill. 286, which was a writ of error by the wife to reverse a decree granting a divorce to her husband, Mr. Justice Breese said: "The record shows that the bill was taken for confessed and the cause submitted on bill and 'oral proof,' and the court finds the facts as charged to be true. We have repeatedly decided that it is not necessary in a proceeding for a divorce, when the bill was taken for confessed, that the oral proof or evidence on which the court acted

should be presented in the record; it is sufficient that the record shows proof was heard sustaining the allegations of the bill. *Shillinger v. Shillinger*, 14 Ill. 147; *Davis v. Davis*, 30 *id.* 180," and the decree was affirmed.

We are unable to perceive the grounds upon which it can be held that a decree of divorce can be sustained on error or appeal where the bill is taken as confessed, and the decree recites that proofs were heard and contains a finding that all the allegations of the bill were proved, and that a like decree, or other affirmative decree, cannot be sustained when there was an answer and replication and the decree contains the same recital and finding.

The bill is a part of the record. The decree in this case refers to the bill as containing the allegations which the decree finds are true as stated in the bill. The bill thus referred to became, upon general principles, a part of the decree for every purpose of construction.

In *Badger v. Daenieke*, 56 Wis. 678, which was a mechanic's lien case, Mr. Justice Lyon said, p. 680: "It is claimed that the finding that all the allegations of the complaint are true is insufficient. We think otherwise. Such a finding is but an application of the maxim, '*certum est quod certum redi potest.*' It is impossible that any party to an action can be prejudiced by the use of this form of finding."

We have, with some hesitation, in view of the language used in some of the opinions of the Supreme Court, reached the conclusion that the finding in this decree is sufficient to sustain the decree, and it will therefore be affirmed.

*Affirmed.*

MR. JUSTICE SMITH dissenting.

**John M. Tananevicz v. J. I. Lamezyk et al.**

**Gen. No. 18,188.**

1. **ADMISSION—effect of, by counsel.** An admission of a material fact made during the trial of a cause by counsel therein, precludes the necessity of proving such fact.

2. **CONTRACT—will not be enforced for work done in violation of ordinance.** Compensation for the laying of a sidewalk cannot be recovered where the contractor laying the same knew at the time when he did so that he was laying a sidewalk above the established grade of the city in which such sidewalk was laid.

Action commenced before justice of the peace. Appeal from the County Court of Cook county; the Hon. WILLIAM C. DEWOLF, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Reversed, with finding of facts. Opinion filed May 28, 1907.

**JAMES J. BRADY, for appellant.**

**A. G. DICUS, for appellees.**

**MR. JUSTICE BAKER** delivered the opinion of the court.

Plaintiffs sued defendant before a justice of the peace to recover the agreed price for the laying of a cement sidewalk by plaintiffs for defendant. The case was taken to the County Court by appeal and in that court there was a verdict for plaintiffs for \$187 and judgment thereon, to reverse which defendant prosecutes this appeal.

The contention of appellant is that the sidewalk in question was laid in front of 3244 South Morgan street in the city of Chicago; that it was agreed between the parties that said sidewalk should be laid, and it was laid, thirteen inches above the grade established by the ordinance of the city of Chicago; that the contract was therefore unlawful and cannot be enforced.

That a court will not enforce a contract made in violation of law, that city ordinances have the force of law and contracts in violation of them are illegal and will not be enforced, is not disputed.

The contention of appellees is, that no ordinance of the city of Chicago establishing the grade of the sidewalk in question was either pleaded or proved, and that it was not even proved that the sidewalk in question was in Chicago.

The suit, as has been said, was originally brought before a justice of the peace. No written pleas were required, and it is presumed that all proper pleas were orally pleaded.

Plaintiff Jorkowski was the only witness called for the plaintiffs. He testified that the sidewalk was constructed above the grade; that defendant insisted that it should be so constructed. On his cross-examination he testified in part as follows:

"Q. Did you tell Tananevicz at any time anything about the city ordinances, what they required? A. I told him before we built the walk.

Q. You told him about the city ordinances? A. Yes, sir.

Q. What did you tell him? A. I told him, then I set my figures according to the city ordinance, and he says he want above that. I says, 'I am going against the rule, against the city ordinance.' He says, 'I don't care, I am the one to pay for the walk, I want to get the walk built the way I want it; I have a pull with the alderman.' "

The first witness called for the defendant was Charles A. Jones, who testified that he was an engineer in the sidewalk department of the city of Chicago. Upon his examination, the following occurred. The witness was asked by defendant's attorney: "While in the sidewalk department did you at any time examine the cement sidewalk in front of 3244 South Morgan street in the city of Chicago?"

Mr. Dicus. (Plaintiffs' attorney.) "Objected to."

Mr. English. (Defendant's attorney.) "I want to prove by this witness that the sidewalk is thirteen inches above the authorized grade. If they will admit that I will not have to prove it."

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Mr. Dicus. "I do not know how far it is."

The Court. "Say thirteen inches, then. Will you admit that?"

Mr. Dicus. "Yes."

(Witness excused.)

The question was as to a sidewalk in the city of Chicago; the admission was as to the sidewalk described in the question, and was an admission that such sidewalk was in the city of Chicago.

Grades are established by ordinance. To prove that the sidewalk was above grade, the defendant must first show the grade and then that the sidewalk was above such grade.

The admission that the sidewalk, "was thirteen inches above the authorized grade," was in effect an admission that a grade had been established by ordinance, and that the sidewalk was thirteen inches above the grade so established. In the face of the admission made by their counsel upon the trial, the appellees cannot here be heard to say that there was no evidence that the grade had been established by ordinance.

It is immaterial what penalties, if any, the ordinance provided for its violation. The convenience and safety of the public require that sidewalks in front of adjoining premises shall be of the same level or grade. The plaintiffs knowingly laid a sidewalk thirteen inches above the established grade, and the courts will not aid them to recover compensation therefor.

The judgment will be reversed with a finding of facts.

*Reversed with a finding of facts.*

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**Timothy C. Clohesey et al. v. George W. Spencer et al.**

**Gen. No. 18,122.**

1. **FINDINGS OF CHANCELLOR—when disturbed on review.** No special weight is given to the findings of a chancellor upon review where there is no conflict in the evidence and no occasion for the chancellor to judge of the credibility and weight with respect to witnesses, but the Appellate Court will review the evidence and

draw its own conclusions therefrom without regard to those adopted by the chancellor.

2. **LACHES**—*when defense of, need not be pleaded.* Where laches appears from the bill of complaint, the question of laches will be considered by the court as affecting the right to relief regardless of whether the defense of laches is interposed by answer or otherwise.

3. **FRAUDULENT CONVEYANCE**—*right of son to give services to father.* Held, from the evidence in this case, that the labor and skill given by a son to his father did not constitute a fraud upon creditors, either actual or constructive.

Creditor's bill. Error to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Reversed and remanded. Opinion filed May 28, 1907.

**Statement by the Court.** This writ of error brings before us for review a decree of the Superior Court to the effect that unless the claims of the creditors of David T. Clohesey be paid within thirty days, together with trustee's and attorneys' fees, a receiver be appointed to take possession of the printing plant described in the bill, to proceed forthwith to sell the same or so much thereof as may be necessary to pay the amount of all claims found due and owing and costs and expenses of this proceeding.

On December 28, 1904, George W. Spencer filed his creditor's bill in the Superior Court of Cook county, which, as subsequently amended by amendment filed June 11, 1906, alleged that he was a judgment creditor of David T. Clohesey on a judgment upon which an execution had been duly issued and returned, "no property found and no part satisfied;" that in 1886 David T. Clohesey and George H. Wallace were conducting a printing plant at 166 S. Clark street, Chicago, as Wallace & Clohesey; that on or about July, 1886, Clohesey purchased Wallace's interest therein and agreed to pay him therefor about \$2,000; that on or about the 1st day of June, 1886, and prior to the time of the purchase of said interest, Timothy C. Clohesey, the father, advanced about \$1,500 to David T. Clohesey

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with which was paid off certain notes secured by chattel mortgages against said printing establishment; that after the purchase by David T. Clohesey of Wallace's interest in said printing establishment, David T. Clohesey carried on said business in the name of Clohesey & Company, and so carried on and conducted the same from that time to the present date.

That Timothy C. Clohesey claims that he is the owner of said business; that Timothy C. Clohesey in 1886 was employed by the city of Chicago in the sewer department and had no knowledge of the printing business and never engaged therein and never devoted any time or attention to the same; that David T. Clohesey is a practical printer and has carried on and conducted said business ever since July, 1886, in the name of Clohesey & Company, and has managed said business and made contracts therein, and had entire charge of the same.

That before he took charge of the business of Clohesey & Company he was earning from \$18 to \$20 per week as foreman in a press room; and that since July, 1886, he has devoted his entire time and attention to the business which is now worth over \$20,000; and that his services are reasonably worth \$50 per week.

That no agreement was ever made between David T. Clohesey and Timothy Clohesey with reference to his compensation; that David T. Clohesey has never received to exceed \$10 per week in said business and all his other earnings and accumulations have remained in said business; that David T. Clohesey is the owner of said business now located at 88 Fifth avenue, Chicago, Illinois; and that the pretended appropriation of said business and the transfer of the same to Timothy C. Clohesey was for the purpose of defrauding the creditors of David T. Clohesey in the collection of their claims; that there was never any foreclosure of the chattel mortgages on said business, but anything done in connection with said chattel mortgages for the purpose of investing Timothy C. Clohesey with the title to said business was illegal and void; and that the same was never properly sold and was never purchased in

any lawful manner by Timothy C. Clohesey; that David T. Clohesey simply pretended to carry on said business in the name of Clohesey & Company, and that all of said property is subject to the claims of the creditors of David T. Clohesey, for the satisfaction of their debts.

That ever since July, 1886, David T. Clohesey has been the active head of said printing business and has conducted and managed it just as before said date; and that all acts done in the name of Clohesey & Company were a mere pretense or sham for the purpose of covering up and concealing the interest of said David T. Clohesey in said business.

The bill also alleged that certain real estate standing in the names of Timothy C. Clohesey, the father, and Catherine Clohesey, the mother, of David T. Clohesey, was in fact the property of David T. Clohesey, and the prayer of the bill was the usual prayer of creditors' bills that said printing plant and said real estate be subjected to the payment of the complainant's debts.

On December 30, 1904, David T. Clohesey was adjudged a bankrupt by the Bankruptcy Court of the Northern District of Illinois. Joseph Grove was appointed trustee in bankruptcy and subsequently filed an intervening petition in the cause, the allegations of which were substantially the same as the allegations of the bill of complaint as amended.

The joint and several answer of the defendants denied the allegations of the bill of complaint, and as to the printing plant set forth that prior to July, 1886, there existed as valid subsisting liens upon said printing business located at 166 S. Clark street, Chicago, Illinois, certain chattel mortgages given to secure notes aggregating more than \$2,000; and that said Timothy C. Clohesey purchased said notes and chattel mortgages with his own money, no part of which was the money of David T. Clohesey, or of any other person; and that as the owner of said notes and chattel mortgages he caused the same to be foreclosed in a regular and proper manner in accordance with law and the

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provisions of said chattel mortgages, and upon a sale under such foreclosure proceedings, he purchased said printing establishment described in said chattel mortgages and took possession of the same, and ever since has been the sole and absolute owner thereof, and has carried on said business with his own funds; and that there was no agreement or understanding of any kind that David T. Clohesey had, or should have, or at any time might have, any interest in said business, or any part thereof; and denies that David T. Clohesey has been the managing head of said business and has conducted the same in the name of Clohesey & Company for the purpose of covering up and concealing the interest of said David T. Clohesey in said business.

That said Timothy C. Clohesey foreclosed said chattel mortgages and purchased the property covered thereby for the purpose of engaging in the printing business; that he had a large family consisting of himself and wife and six children, and it was with a desire of availing himself of the services of several of said children that he purchased and became the owner of said printing establishment; that he immediately took a daughter—Catherine Clohesey—from school and placed her in charge of said business as bookkeeper and cashier to look after the financial affairs of the business; that he opened up a bank account and granted authority to her to draw checks upon the same; and that she was the only one that had any control over said finances; that he placed another son—Timothy J. Clohesey—in said business, and he also had his son David T. Clohesey work for him in said business; and that all of said children during all the period aforesaid lived at home with said Timothy C. Clohesey; and that he has paid to each of them the sum of \$10 per week for their personal spending money and has given to them their board and clothing; and that he has during all of the years aforesaid carried on said business with the aid and co-operation of said children, and while he is not a practical printer, nor has any technical knowledge of the business, that he is more than sixty years

of age and he has given to his children the benefit of his judgment and advice with regard to the care and management and policy of said business, and has superintended the financial affairs of said business and has seen that said business was conducted in a careful and conservative manner; that he has drawn from said business the sum of \$35 per week for the support of his family and has used other large sums of money in his personal affairs; and that none of said children has any interest in said business.

That the increase of said business has not been due to the efforts of said David T. Clohesey, but said business has been increased and prospered solely through the careful management of said Catherine Clohesey and the wise supervision of Timothy C. Clohesey.

That the printing plant as covered by said chattel mortgages was destroyed by fire many years ago and the present plant is an entirely new plant purchased with moneys exclusively the moneys of Timothy C. Clohesey, derived by him, not from the carrying on of said printing business, but from moneys earned by him in real estate investments and as foreman in the sewer department of the city of Chicago.

EDWARD S. CUMMINGS, for plaintiffs in error.

HARRY A. BLOSSAT, for defendants in error; ATWOOD, PEASE & LOUCKS, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

Plaintiffs in error contend that the decree is contrary to the evidence and the law; and that the bill and intervening petition should have been dismissed for want of equity.

The record shows that there is but little controversy over the facts. The complainants and the intervening petitioner, Joseph Grove, trustee in bankruptcy of the estate of David T. Clohesey, called as their witnesses the plaintiffs in error, defendants below, as to the facts

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out of which the equities of complainants' case are claimed to arise. Aside from the plaintiffs in error, complainants and intervening petitioner called Sadler, a mason, Burns, an architect, Hoppe, a carpenter, as to the real estate standing in the name of Catherine Clohesey and Timothy C. Clohesey, the mother and father of David T. Clohesey, but the court found in its decree in favor of plaintiffs in error as to the real estate and as to that dismissed the bill for want of equity. No cross-errors are assigned. We therefore need pay no attention to the testimony of these witnesses.

It appears from the evidence that in 1885 complainant Spencer, George H. Wallace and David T. Clohesey were co-partners in the printing business and conducted the business for about a year. Wallace and Clohesey then purchased the interest of Spencer and continued to run the business for another year when Wallace, who attended the finances of the firm, became insane and disappeared. At the time Spencer's interest in the firm was purchased there were two chattel mortgages upon their plant. The first mortgage was dated September 15, 1885, and was given to W. H. Kretsinger to secure the notes of Spencer, Wallace and Clohesey, aggregating \$1,500. The other mortgage was dated December 17, 1885, and was given to O. N. Blomgren to secure their note for \$1,593.06. After the purchase of Spencer's interest and the disappearance of Wallace, David T. Clohesey informed his father Timothy C. Clohesey of the condition of the business, and of the existence of the chattel mortgages, and that Wallace had taken what money they had, and that the business would have to be closed out.

Without the knowledge of David T. Clohesey, his father purchased the chattel mortgages and acting under legal advice caused the mortgages to be foreclosed, and purchased the printing plant at the foreclosure sale. The business was closed for a time, but Clohesey, Sr., put his daughter Catherine in the

office as cashier and bookkeeper and with her assistance and the assistance of his sons, David T. and Timothy J. Clohesey, opened up the business and conducted it from that time until the bill in this case was filed, December 28, 1904. When Clohesey, Sr., foreclosed the mortgages and commenced the business, he opened a bank account in his own name and authorized his daughter to sign checks. During the entire period of about eighteen years that Clohesey, Sr., conducted the business in this manner, there was no formal agreement between him and his sons and his daughter as to their wages, but each drew from five to ten dollars per week for spending money. They all lived at home with their parents and received his or her board and clothing. Thirty-five dollars were drawn each week for family expenses.

The father was not a practical printer and left the details of the business largely to his sons and his daughter. The daughter, however, was mainly relied upon as the sons were more or less dissipated and were in a habit of absenting themselves from the business many times a year for three weeks or longer at a time, while the daughter attended to the business all the time.

The receipts from the business and rents derived from his real estate were all deposited by Clohesey, Sr., in the bank account, and any buildings erected or repairs or improvements made were paid for out of this account by checks drawn upon it. The evidence shows that this was a general bank account and that Clohesey, Sr., had no other.

All the witnesses testified that no one had any interest in the business except the father, Timothy C. Clohesey. The evidence tended to show that in 1886 the plant was worth about \$6,000 and that at the time of the hearing of the case it was worth from \$10,000 to \$15,000.

The complainant obtained judgment against Wallace and David Clohesey in December, 1896, on their note

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given to him. This judgment was revived on May 12, 1904, for \$1,226.25, and execution was duly issued and returned no part satisfied.

Defendants in error urge that the chancellor's findings of fact will not be lightly disturbed, and will only be disturbed when manifestly against the weight of the evidence.

It is true that where there is a sharp conflict in the evidence over controverted questions of fact, and the trial court has an opportunity of seeing the witnesses and hearing their testimony as it is delivered orally, the findings of the court upon mere questions of fact will not ordinarily be disturbed on appeal unless such findings are clearly and manifestly against the preponderance of the evidence. In this case, however, plaintiffs in error were called by the complainant and intervening petitioner and their testimony constitutes the only evidence, substantially, upon which the alleged equity of the case rests. It is therefore a case where there is no conflict in the evidence and there was no occasion for the chancellor to judge of the credibility and weight of evidence of the respective witnesses. The chancellor was required to draw conclusions simply from the testimony of the witnesses. This, we think, can be done as well by an appellate tribunal as by the chancellor in this case, and the reason of the above rule does not exist in the case at bar. We consider ourselves free therefore to draw our own conclusions from the evidence without attaching any special weight to the findings of the chancellor.

It is contended further on behalf of defendants in error that in considering the evidence in the record we cannot consider the question of *laches* on the part of the complainant, because it is not pleaded as a defense. If that defense had been pleaded, it is urged, the complainant could have amended his bill so as to show fraudulent concealment.

We think, however, where the delay of eighteen years in asserting the alleged equitable right appears

on the face of the bill and in the evidence of complainant offered in support thereof, we cannot dismiss that fact from our consideration, for it is in this case something more than a technical defense. It cannot be ignored in considering the complainant's case. It is a distinctive and peculiar feature of his case which is wholly unexplained and unaccounted for in the bill or in the evidence.

In Benson v. Dempster, 183 Ill. 297, it does not appear that the defense of delay was set up by answer or otherwise by the defendant. It does appear by the bill, as in the case at bar, that the father of the complainant was guilty of gross *laches*, and the court considers the inexcusable delay on the part of complainant's ancestor, and his heirs, and holds that "a court of equity will refuse relief on the ground of lapse of time and its inability to do complete justice."

In Brown v. Brown, 154 Ill. 35, the *laches* of complainants appeared from the bill and it does not appear that it was set up and relied upon in any pleading of the defendant. There it was sought to set aside a deed made in August, 1865, and recorded in the following December. It appeared that for a period of over twenty-six years complainants acquiesced in the conveyance, and it was held that where a party had slept upon his rights, or acquiesced for a great length of time, a court of equity should refuse relief. And so in Walker v. Carrington et al., 74 Ill. 446, the long delay in filing the bill, showing acquiescence in the adverse rights of appellant, barred the claim. It is true that in the Walker case, *supra*, the defense was claimed in the answer, but no specific facts were pleaded constituting the defense, which did not appear in the bill.

We think, therefore, that inasmuch as the unexplained delay of complainant for eighteen years in taking the necessary steps to assert his claim appears in his bill and the evidence offered to sustain it, the court in considering his case must view it in the light of all the circumstances, and particularly in the light

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of his action or acquiescence in the long continued, open and notorious possession by plaintiff in error Clohesey, Sr., of the plant and business which he now seeks to subject to the payment of his judgment. Spencer was a party to the chattel mortgages which were foreclosed. He made no effort to contest the title of Clohesey, Sr., under the foreclosure for more than eighteen years, during all of which period he knew that Clohesey, Sr., was claiming title to the property in the most notorious and open manner. Spencer's claim and the claims of the other creditors represented by the trustee in bankruptcy must be regarded, in our opinion, as tainted with staleness, and a court of equity should refuse relief on the ground of lapse of time and its inability to do complete justice.

Independently, however, of the question of *laches*, we do not think the complainant is entitled to relief on the evidence. No fraud on the part of Clohesey, Sr., is shown. There is nothing of a suspicious nature in his conduct in connection with the printing plant and business. What was done by him can as well be attributed to honest motives and fair dealings as the reverse, and when that can be done, it will be so considered.

When the affairs of the firm of Wallace and Clohesey came to the point that their business could not be continued it was natural that Clohesey, Sr., should endeavor to save something from the wreck, and perhaps the business itself. He had loaned to his son \$1,000 to start him in the business, and this was totally lost unless he could save the business and continue it successfully. While it is insinuated that he purchased the plant at his own sale and that the sale was therefore void, no definite evidence was offered to show any fraud in that regard. The exact method and steps taken to foreclose the mortgage do not appear in the record. In the nature of things it was impossible to show the details of the foreclosure proceedings, owing to the great lapse of time. The mortgages were not assigned to Clohesey, Sr., and the

mortgagees therefore became trustees for the holder of the notes. It was for them to sell the property described in the mortgages under the powers contained in the mortgages for the payment of the indebtedness represented by the notes. This was done under the advice and direction of able and experienced counsel. Blomgren, one of the mortgagees, was called as a witness, but he could remember nothing about the transaction except that he had a mortgage and that "we got the money in trust and paid it out to the different concerns—other concerns." He did not remember any transaction with the elder Clohesey or what was done with the mortgage. He parted with the paper, but did not remember to whom he transferred it. The inference from the testimony in the record is that at the time the notes were purchased by Clohesey, Sr., some arrangement was made with the mortgagees for the foreclosure of the mortgages and that a sale of the property was had under the mortgages. In our opinion that sale should not be set aside for mere irregularities, if any, and held for naught at this late day on the evidence in the record.

It is urged on behalf of defendants in error that David T. Clohesey had no right to make a gift of his labor, skill and intelligence to his father in fraud of his creditors, and inasmuch as his father has received the benefit of his services, and the greater part of his earnings remained in the business, the printing plant should be sold as the decree provides. We cannot yield assent to this proposition from a legal point of view; nor do we think the evidence shows that David T. Clohesey's services, considering his habits and the uncertain and intermittent character of his services, were reasonably worth more than the evidence shows he received.

For the reasons given, the decree of the Superior Court is reversed and the cause is remanded with directions to dismiss the bill and intervening petition for want of equity.

*Reversed and remanded with directions.*

**Chicago City Railway Company v. Stanislous Soszynski,  
Administrator.**

Gen. No. 18,187.

1. **STREET CAR TRACKS—instruction as to duty of person undertaking to drive across, approved.** An instruction upon this subject as follows, is approved:

"You are further instructed as a matter of law that if you believe from the evidence that when the plaintiff started to drive across the tracks of the defendant on the occasion in question he saw the south-bound train in question approaching from the north and knew that said train was coming at such a rate of speed that he could not cross said tracks without being struck by said train unless said train should be stopped or slackened in speed and that so knowing he deliberately took the chances of crossing said track in safety, then he cannot recover in this case and you should find the defendant not guilty."

2. **NEGLIGENCE—instruction as to extent of obligation of gripman to anticipate danger, approved.** An instruction upon this subject as follows, is approved:

"The court instructs you that with reference to the gripman on the occasion in question, the law did not require him to anticipate or to guard against anything which was not reasonably to be expected, and the law did not require him to regulate his conduct with reference to any conduct of others not reasonably to be expected by him under the circumstances in evidence."

3. **NEGLIGENCE—instruction as to extent of obligation of servants of traction company to anticipate danger, approved.** An instruction upon this subject as follows, is approved:

"The law does not require or exact of a street car company that its servants should be all the while upon their guard against dangers not reasonably to be expected, or against unusual or extraordinary occurrences or conduct on the part of others, nor does it require them to conduct their cars with a degree of caution that would prevent the practical operation of its road."

4. **MEDICAL EXPERT—what evidence of, competent; what not.** A medical expert is competent to state what effects might have resulted from a fall; but whether the effects described did result from that fall or were produced by some other cause or causes, is a question for the jury.

Action in case for personal injuries. Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Reversed and remanded. Opinion filed May 28, 1907.

**Statement by the Court.** This appeal is prosecuted from a judgment of the Circuit Court against appell-

lant and in favor of Frank Soszynski for \$5,000. On February 13, 1902, Soszynski was driving three horses attached to a coal wagon across State street between 13th and 14th streets in the city of Chicago, and the wagon was struck by a State street cable train. The wagon and its contents weighed ten tons, and it was struck with sufficient force to tip it over and Soszynski was thrown to the ground and injured.

The declaration contains two counts. The specific charge of negligence against defendant in the first count is that while the plaintiff, who was then and there driving his horses attached to the wagon in question across said car tracks, to wit, at the point half way between 13th and 14th streets on State street, using due care and diligence on his part for his own safety, the defendant by its servants carelessly and negligently drove and managed one of its street cars so that it struck with great force and violence against the wagon in which the plaintiff was riding, and by reason of the premises the wagon of plaintiff was overthrown, etc.

The second count avers that while plaintiff was driving said horses attached to said coal wagon across defendant's tracks, and while said street car of defendant was, to wit: 500 feet north of the point where said plaintiff was driving, the defendant by its servants carelessly and negligently drove one of its said street cars at a dangerous and high rate of speed, to wit, at a rate of fifteen miles per hour, and so carelessly managed the street car that said street car suddenly and without giving the plaintiff sufficient time in which to cross from the east to the west side of State street, and while plaintiff was rightfully driving the horses and wagon aforesaid in a westerly direction across the tracks of the said defendant, the said car struck with great force and violence against the wagon, by reason of which the wagon was overthrown, etc.

The evidence on behalf of plaintiff tended to show that when he started to cross the tracks of the defend-

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ant he saw the south-bound train approaching from the north, but it was so far away from him that he believed he had time enough to cross; that nothing obstructed the view which he had of the approaching train or the view of the gripman, and that the latter so negligently ran and managed the train that he collided with plaintiff's wagon.

The evidence on behalf of the defendant tended to show that as the south-bound train approached the scales where plaintiff was standing, a north-bound train was passing and obscured the view which the gripman otherwise would have had, and that plaintiff drove west behind the north-bound train across the south-bound track when the south-bound train was so near that the gripman could not, in the exercise of ordinary care, stop his train in time to avoid the collision.

WILLIAM J. HYNES and GEORGE W. MILLER, for appellant; MASON B. STARLING, of counsel.

JAMES J. KELLY and JOHN C. KING, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

Defendant (appellant) requested the court to give the following instruction:

"You are further instructed as a matter of law that if you believe from the evidence that when the plaintiff started to drive across the tracks of the defendant on the occasion in question he saw the south-bound train in question approaching from the north and knew that said train was coming at such a rate of speed that he could not cross said tracks without being struck by said train unless said train should be stopped or slackened in speed and that so knowing he deliberately took the chances of crossing said track in safety, then he cannot recover in this case and you should find the defendant not guilty."

The court refused to give the instruction. Appellant assigns error upon this action of the court.

In our opinion there was abundance of evidence in the case to require the giving of this instruction. Appellee's intestate testified that he was seated on his wagon facing north while it was standing on the scales on the east side of State street, and that he saw this train about 13th street. The testimony of Egenthaler, Burns, Cahill and Miller as to the clear view of the street from the scales, and the speed of the train, and the testimony of Gaynor, Burns, Maguire, Butler, Braun, Stratton and Soszynski, as to the distance of the train from the wagon at the time appellee's intestate started to cross the tracks of appellant, afforded a substantial basis for the theory of appellant which is embodied in the instruction. The tendered instruction correctly announced the law applicable to the facts which the evidence tended to prove, we think, and should have been given. *Hot Springs Ry. Co. v. Johnson*, 64 Ark. 420; *Helber v. Spokane St. Ry. Co.*, 22 Wash. 319; *O'Neil v. Dry Dock E. B. & B. R. Co.*, 129 N. Y. 125; *Ehrisman v. East Harrisburg City P. Ry. Co.*, 150 Pa. St. 180; *Chicago W. Div. Ry. Co. v. Bert*, 69 Ill. 388; *North Chicago Electric Ry. Co. v. Peuser*, 190 id. 67. The doctrine of the instruction was approved in *Chicago Union Traction Co. v. Jacobson*, 217 Ill. 404. The testimony would warrant the conclusion that Soszynski knew when he drove his heavily loaded wagon upon appellant's track that a collision would be inevitable in the ordinary operation of the train, unless the gripman of appellant could prevent the collision by his care and diligence. The instruction was based on the rights and duties of the respective parties at the place where the accident occurred. The hypothesis of fact stated in the instruction was such as would make the act of driving upon the track negligent as a matter of law.

The court should have given the following instructions requested by appellant:

"The court instructs you that with reference to the gripman on the occasion in question, the law did not re-

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quire him to anticipate or to guard against anything which was not reasonably to be expected, and the law did not require him to regulate his conduct with reference to any conduct of others not reasonably to be expected by him under the circumstances in evidence."

"The law does not require or exact of a street car company that its servants should be all the while upon their guard against dangers not reasonably to be expected, or against unusual or extraordinary occurrences or conduct on the part of others, nor does it require them to conduct their cars with a degree of caution that would prevent the practical operation of its road."

These instructions were applicable to the evidence in the case. They state the law with sufficient accuracy. It was error to refuse them.

The accident happened on February 13, 1902. The contention for the plaintiff is that Soszynski was thrown by the collision from the wagon seat and that he fell head foremost upon the pavement. According to the testimony of Dr. Szwaikart he treated the appellee's intestate for the injuries received at the collision; that he again saw him in November, 1903, and that appellee's intestate then had an enormous swelling under the left maxillary bone; that the left jaw was much larger than its natural size; that the swelling involved parts from the temple to the clavicle; that he ordered hot applications for that part of the face, and suggested that he go to the hospital.

Dr. Laibe testified that he first knew appellee's intestate in November 1903, at St. Mary's Hospital, and describes the conditions which he found; that he opened the abscess which he found and took out several ounces of pus, and removed a small spiricula of bone. Appellee's intestate testified that the third day after this the doctor took out a piece of dead bone from his jaw; that he was operated upon twice; that the left side of his neck was stiff where it was cut and that he could not wear a collar. Upon these facts it was contended that by the fall a splinter of bone was broken off the angle

of his jaw in February 1902, and that this caused the abcess in November, 1903.

Appellant contended on the other hand that if the fall received in February, 1902, had splintered a piece of bone from the jaw, an abcess would have developed, if at all, within a few weeks after the accident, and that the long time which intervened between the accident and the development of the abcess precluded the possibility of the injury received in the accident being the cause of the abcess. This contention is based in part upon the testimony of the above named doctors in their cross-examinations, and the testimony of Dr. Hall, called by appellant. Thus, the record shows, it was a sharply contested question in the case whether the accident, which happened in February, 1902, was the cause of the abcess which developed in November, 1903.

During the examination of Dr. Laibe by counsel for plaintiff the following occurred:

"Q. Doctor, suppose that the patient upon whom you then performed the operation had, on the 13th day of February, 1902, been thrown from a wagon, an ordinary coal wagon, head foremost, on the left side on to a street paved with granite, would that fall, in your opinion, at that date, create the condition which you found in November, 1903?

Mr. Miller: That I object to, as being incompetent for the doctor to state. It is a question for the jury to decide.

Mr. King: No, the doctor depends on his knowledge.

The Court: The objection is overruled."

To which ruling of the court, the defendant by its counsel, then and there duly excepted.

"A. A traumatism at that time would, in all probability, produce the conditions as found at that late date.

Mr. Miller: I move to strike out the answer, on the ground that it is incompetent for the doctor to state.

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The statement that it would produce this condition is for the jury to decide. The doctor's answer usurps the functions of the jury.

The Court: The motion is overruled."

To this ruling of the court the defendant duly excepted.

In our opinion the objection to the testimony should have been sustained. The court permitted the witness to swear to cause and effect. The witness was permitted to give his opinion upon a vital fact in the case which it was the province of the jury to determine from the evidence. He was competent to state what effects might result from the fall, but whether the effects described did result from the fall or were produced by some other cause or causes was a question for the jury. The question here presented has been so fully discussed in I. C. R. R. Co. v. Smith, 208 Ill. 608; City of Chicago v. Powers, 117 Ill. App. 453; Chicago City Ry. Co. v. Sugar, 117 Ill. App. 578; Muldowney v. I. C. Ry. Co., 36 Ia. 462; City of Chicago v. McGiven, 78 Ill. 347; Ferguson v. Hubbell, 97 N. Y. 507; C. & A. R. R. Co. v. S. & N. W. R. R. Co., 67 Ill. 142; Nat. Gas L. & F. Co. v. Miethke, 35 Ill. App. 629; Noonan v. The State, 55 Wis. 258; and Knoll v. The State, 55 Wis. 249, that we can add nothing by way of elucidation.

For the errors indicated the judgment is reversed and the cause remanded.

*Reversed and remanded.*

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**John Ptacek et al. v. Josefina Pisa et al.**

**Gen. No. 13,148.**

**1. FRATERNAL BENEFIT SOCIETY—character of interest of beneficiary in certificate of.** A beneficiary named in a fraternal benefit certificate acquires no vested interest.

**2. FRATERNAL BENEFIT SOCIETY—power of member to change beneficiary.** A member has a right to change a beneficiary named in

a certificate without the surrender of the old certificate, and this without regard to the fact that the old beneficiary was a creditor.

Bill of interpleader. Appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Affirmed. Opinion filed May 28, 1907.

**Statement by the Court.** Josef Pisa became a member of the appellee, Supreme Lodge Bohemian-Slavonian Knights and Ladies, a fraternal benefit society organized under the laws of Illinois, and took out a benefit certificate payable at his death to his wife, appellee, Josefina Pisa. In May, 1900, in consideration of the promise of appellants that he and his wife would be taken to the home of appellants and furnished board and lodging for the remainder of their lives, Josef Pisa surrendered his benefit certificate and took out a new one payable to appellants, John Ptacek and Marie Ptacek, the stepson and his wife of said Josef Pisa. Josef Pisa was in arrears with his dues and assessments, and appellants were to pay all dues and assessments, including those in arrears on the certificate payable to Josefina.

Appellants took Josef and Josefina Pisa into their home and furnished them with board and lodging until March 16, 1905. At that time it is claimed by appellants that the physical condition of said Josef became such that it was impossible without menacing the health of the family to keep him in their house, and they placed him in the Cook County asylum at Dunning, where he died, September 19, 1905. There is a controversy in the evidence upon the question of the assent of Josef Pisa to being placed in the asylum. Josefina Pisa was displeased with this action of appellants. She remained at the home of appellants about a month after the transfer of her husband to the asylum, and then left appellants' home.

In June 1905, Josef Pisa, after demand made upon appellants for the old certificate, took out a new certificate making his wife Josefina the beneficiary. Appel-

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lants had no knowledge of this and continued to pay the dues and assessments up to the time of Josef Pisa's death.

Appellants and appellee Josefina Pisa each claimed the amount due on the certificate. The appellee Lodge filed this bill of interpleader and offered to and did bring the money into court, and the claimants answered, setting up their respective claims to the fund.

The Superior Court in its decree found that appellants were not members of the family of Pisa at his death, nor were they heirs, blood relations, affianced husband or affianced wife of, or persons dependent upon Pisa; that on June 15, 1905, a new certificate was issued to Pisa by complainant according to the laws of the order for \$1,000, payable on death of Pisa to Josefina Pisa, his wife; that appellants from May 15, 1900, up to one month before the death of Pisa, regularly paid the assessments and dues for Pisa; that the certificate issued to appellants was void because made to beneficiaries outside of any of the classes provided by statute; that the consideration alleged by appellants for being designated by Pisa as beneficiaries was too vague, indefinite and uncertain and that the last certificate issued June 15, 1905, was properly issued; that appellants have an equitable lien upon the fund to the extent of the dues and assessments paid by them, with interest thereon amounting to \$130; that the funeral expenses, \$112.50, and \$50 solicitors' fees should be deducted from the fund. It decrees therefore that out of the \$1,000 complainant retain the funeral expenses, solicitors' fees and court costs, and pay the balance \$825.25 into court, out of which the clerk shall pay to appellants \$130 and the remainder \$695.25 to Josefina Pisa.

The decree is brought here for review by this appeal.

CHARLES D. LUSK, for appellants.

CHARLES A. CHURAN, for appellees.

Mr. JUSTICE SMITH delivered the opinion of the court.

Many questions are discussed in appellants' brief and argument which, in the view we take of the case, it is unnecessary for us to consider or determine. The main position of appellants is that the contract made by them with Pisa was a valid contract and that it was substantially performed by them; that the consideration paid by them was of such a character that it was necessarily paid and accepted as time elapsed. It could not be tendered back, and in such case equity will not forfeit the amount of the consideration paid, when inevitable necessity caused a temporary suspension of the services being rendered.

This contention, however, as to the validity of the contract for board and lodging, and the consideration which the performance of it affords, does not appear to us to be material for the reason that all that appellants claim in that regard may be conceded, and still it would not follow that appellants acquired any right to have the certificate designating them as beneficiaries maintained, or that Pisa could not at any time thereafter make a new designation of another proper beneficiary under the laws of the order and the statute. Nor would it follow that appellants at any time acquired a lien upon the certificate or the fund payable under it on the death of Pisa.

As said in *Kirkpatrick v. Modern Woodmen of America*, 103 Ill. App. 468-473: "A benefit certificate in a society of this character differs from an ordinary policy of life insurance in that it speaks with reference to the conditions existing at the time of the death of the member whose life has been insured by it. A beneficiary named in a certificate of a fraternal benefit society, organized under the statutes of the State of Illinois or like statutes of other states, has no vested interest in such certificate or in the fund provided for its payment, until the decease of the member whose death matures the certificate. The constitution

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and by-laws of the society and the statutes of the state must be construed with reference not only to the terms of the certificate, but the status of the parties existing at the date of the death. *Delaney v. Delaney*, 175 Ill. 187; *Voigt v. Kersten*, 164 Ill. 314; *Baldwin v. Begley*, 185 Ill. 180; *Order of Railway Conductors v. Koster*, 55 Mo. App. 186; *Union Mutual Ass'n v. Montgomery*, 70 Mich. 587; *Tyler v. Odd Fellows Mutual Relief Ass'n*, 145 Mass. 134."

Josef Pisa became a member of the appellee society on February 9, 1895. In November, 1900, the certificate was revoked and a new certificate was issued, designating appellants as beneficiaries. June 15, 1905, Josef Pisa caused a third certificate to be issued, designating appellee Josefina Pisa as beneficiary.

On June 22, 1893, a statute relating to and governing the class of societies to which complainant belongs went into force in this state, whereby it was provided that "payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife, or to persons dependent upon the member, and such benefits shall not be willed, assigned or otherwise transferred to any other person." Hurd's Revised Statutes of 1893, chap. 73, sec. 258. But it cannot be claimed with reason that there is anything in the above statute that prevented Pisa from appointing another beneficiary in the place of appellants. Our attention has been called to no by-law of the society or provision of the contract with the society which prohibited a change of beneficiary at any time. The restrictions in the above cited statute are that benefits shall not be willed or transferred and that when a beneficiary is designated it must be one who is included within the terms of the statute. It is not claimed that appellee Josefina Pisa is not a person within its terms. She was the beneficiary at the date of death of Josef Pisa, and therefore must be considered as entitled to the fund in question by the terms of the certificate.

But it is urged that the new certificate was procured without the consent of appellants, and without a surrender of the old certificate. This, we think, is likewise immaterial. It is said in Niblack on Benefit Societies & Accident Ins. (2nd ed.), sec. 222: "A member and the society may during the life of the member, waive these requirements, and may agree upon a new beneficiary of the contract in any manner satisfactory to both parties." To the same effect is 1 Bacon on Benefit Societies & Life Ins., sec. 308; *Splawn v. Chew*, 60 Texas, 532; *Martin v. Stubbins*, 126 Ill. 387; *Delaney v. Delaney*, *supra*; *Nat'l Aid Society v. Lupold*, 101 Pa. St. 111.

In *Delaney v. Delaney*, *supra*, it is said: "It would seem to follow, as a necessary corollary from the doctrine that the certificate is a contract between the society and the member, and not between the member and the beneficiary, that the society and the member can modify or change their contract in any way satisfactory to themselves. An expectancy, which is the only interest held by the beneficiary prior to the death of the member, is not property, and therefore a change of the contract made by the society and the member together could not injure or affect in any way a property interest of the beneficiary."

We hold, therefore, that if the contract set up by appellants be admitted, and if its substantial performance by appellants be conceded, appellants thereby acquired no equitable or legal right to the certificate designating them as beneficiaries, or the fund from which it would be paid upon the death of Pisa. Appellants were not parties to any contract with the society. During the life of the certificate for their benefit they had only an expectancy, which is not property. Upon the change of the certificate made on June 15, 1905, and from that date to the death of Pisa, appellants did not even have an expectancy in the fund in question. Creditors of Pisa they may have been, but that question is foreign to the issue here, and we do not pass

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upon it, but they show no equitable or legal right to the fund in court, and have no just complaint against the decree.

The decree of the Superior Court is affirmed.

*Affirmed.*

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**The Chicago, Rock Island & Pacific Railway Company v.  
Arthur Clark.**

Gen. No. 18,152.

1. **ASSUMED RISK—*how question of, to be determined.*** Whether an injured servant assumed the risk of the danger from which his injury resulted, is, ordinarily, a question of fact for the jury. Such question, however, under certain conditions named in this opinion, becomes one of law to be determined by the court.

2. **ASSUMED RISK—*how long servant may rely upon promise to repair.*** A promise to repair by a specific date may justify the servant in continuing at his employment beyond such date.

3. **INSTRUCTION—*propriety of refusing, telling jury to regard the law and the evidence.*** It is not error to refuse to instruct the jury that it is their duty to regard the law and the evidence. Such an instruction is unnecessary and superfluous.

Action in case for personal injuries. Appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in this court at the October term, 1906. Affirmed. Opinion filed May 31, 1907.

**Statement by the Court.** This is an appeal from a judgment for \$10,000 against the appellant in favor of the appellee in the Superior Court of Cook county. There have been two trials of the cause below, the first resulting in a verdict for \$12,500. A new trial was granted and the verdict on the second trial was \$10,000. After a motion for a new trial and a motion in arrest of judgment had been overruled, judgment was rendered on the verdict.

The plaintiff below, the appellee here, was injured in the shops of the appellant company in Chicago, December 24, 1901. He lost his left arm just below the el-

bow. He was eighteen years old on December 3rd of the same year.

The declaration on which the cause was tried charges the defendant with assigning the plaintiff while in its employ to operating a planing machine which was propelled with steam power and which had the power communicated to it by means of pulleys, belts, gearings and shafting, in so bad and defective a condition that on account thereof a certain belt running from said pulleys to said power caused said planer to start into operation automatically without the knowledge of the person in charge of the same.

It further alleges that prior to the day of the accident this defective condition was reported to the defendant, and the defendant promised to remedy said defective condition, and that thereupon the plaintiff was induced to and did continue to operate said planer for a period of one week after the defendant had made said promise, but that on the day of the accident the planer was set into operation without warning or notice to the plaintiff, and the plaintiff's arm thereby caught, crushed and thus severely injured by the planer.

Another count avers that the plaintiff was engaged under the employment of the defendant in the operation and management of the planer, and that the steam engine, gearing, belting, shafting and planer were so carelessly, negligently, insecurely and improperly set and maintained, that by reason of the neglect of the defendant certain pulleys, shafting, gearing, shifters, hangers and other devices connected with the operation of the planer were permitted to be and remain so loose and bent, and of such improper construction and condition that said planer was apt to put itself into operation after the same had been placed out of gear, all of which was known to the defendant, and the plaintiff, while in the exercise of due care for his own safety, and within a reasonable time after a promise of the defendant to repair said machinery, became caught and entangled in the planer and lost his arm.

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To this declaration the defendant pleaded the general issue.

At the trial the defendant made a motion at the close of the plaintiff's evidence and at the close of all the evidence, for a peremptory instruction to the jury to find a verdict of not guilty. The denial of these motions is assigned and argued in this court for error, as are also the alleged admission of improper and exclusion of proper evidence. It is also insisted that the verdict is against the weight of the evidence, and that a new trial should have been for that reason granted.

BENJAMIN S. CABLE, for appellant.

KBUSE & PEDEN, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

It is vigorously argued by appellant's counsel, as the basis of his complaint of the judgment appealed from in this cause, that the peremptory instruction for the defendant asked for at the close of the plaintiff's evidence, should have been given, on the ground that it showed that under the law the plaintiff, Arthur Clark, assumed the risk of the danger that resulted in his injury.

The consideration of this point requires a review of the evidence.

The plaintiff, Clark, entered the employment of the defendant company at sixteen years of age. He had before so entering no experience with machinery. He entered the machine shop as an apprentice. He was employed to sweep the shop, operate a drill press and do general work. Two or three months before the injury for which he has recovered damages in this case, he was assigned to a certain planer called the shoe and wedge planer, and ran it continuously up to the time of the accident. The planer in question was an intricate piece of machinery. The plaintiff testified that his practice was to shut off the action of the planer by

means of a long piece of wood, called a shifter, suspended from the ceiling and connected with the machine. He had been shown how to start and how to stop the planer, but this was all the special instruction he had received concerning it. Several times, he says, during the two or three months he had worked on the machine, it had started up automatically. About a week or ten days before the accident the plaintiff complained of this to his foreman, Hauck. To use the plaintiff's own words: "I got Jack Hauck and I showed him the machine and told him I was afraid to run it and I didn't want to run it; I said I wanted a new machine. I told him it was dangerous, and he told me to go back to the machine and he would make a new one on me Sunday." On cross-examination he was asked: "You did complain of the machine starting up of its own accord?" and answered, "Yes." Counsel then said (slightly varying statement of the plaintiff in the direct examination): "Q. He said, 'Go back and I will have a new machine for you by Sunday?'" and was answered, "Yes, sir." Further on in the cross-examination the witness was asked: "When was the first time you noticed it start up, with reference to the accident?" He answered, "I guess I was working on the machine about a week or three days the time it started up on me, and I clamped down a driving box and it pulled the driving box pretty near off." Further questions and answers followed, thus:

"Q. When did it start up again? A. \* \* \* Two or three weeks after.

Q. You had trouble with it starting up off and on all the time you had it? A. I could not say all the time, \* \* \* maybe some days it would not start up at all, and other times it would start up at noon time; I could not tell you just when.

Q. Might start up any old time? A. Might start any old time."

This automatic, unforeseen and improper starting of

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the machine, at times was also testified to by other witnesses for the plaintiff—by Edward Calonder, a fellow workman in the shop, and by George Clark, a former machinist there. (This last testimony is omitted from the abstract.) Calonder also confirmed the plaintiff in his statement that plaintiff complained of the machine to the foreman. He swears that a week or nine days before the accident he heard the plaintiff, Clark, say to Hauck, "I want to change or I want this machine fixed here," to which Hauck replied, "Never mind, boy, go back; I will have a new machine for you there by Monday."

Evidence was introduced for the plaintiff, tending to show that defects in various parts of the somewhat elaborate mechanical appliances connected with the planer—worn and unfit connections and improper relative location or alignment of parts of the machinery—may have contributed in differing and uncertain proportions to the improper action of the machine, the immediate cause of which was a belt moving or "climbing" automatically from a loose to a fixed pulley. But while these various defects and defective arrangements were shown to be matters naturally tending to such dangerous and improper working as resulted, it is not shown that the plaintiff could say, from experience or expert knowledge as to any one or more of them, that it or they were the defects or disarrangements which must be remedied to make the machine safe. The defect of which he complained was the automatic starting, or, in other words, that combination of causes, whatever they were, which made the belt "climb."

Neither plaintiff nor Calonder can tell what day of the week this conversation between plaintiff and Hauck took place. The accident happened on December 24, 1901. So, at least, it is alleged by the declaration and sworn to by the plaintiff, who seems, however, to have accepted the date from his counsel rather than from actual recollection. If this date be correct, as we assume it is, Dr. Tait's testimony is mistaken as to time. But Dr. Tait, too, apparently accepted a date

tendered in the question of counsel. December 24, 1901, was Tuesday, not Wednesday, as stated in the appellant's argument.

The manner of the accident was thus substantially detailed by the plaintiff "That morning I had a big job on the planer. I finished it up and took it off about half past eleven. When I took the work off I shut the planer off by the shifter. I pulled the shifter two feet or so straight up as far as it would go. Then I put on another job, and spent half an hour or more putting it on. Between twelve and one was the dinner hour, and I stopped work. At one o'clock I returned to the planer. I had not then quite finished setting up my job. I finished it and when I got it all set up, all my material on the table, I went to get a gear wheel from the planer bed where I kept it and my tools. I had been told to keep them there. It was customary to keep them there. The planer bed made a kind of a square box in the bottom. I put my left arm through the opening there was there between the edge of the planing table and the end of the machine, to take the gear wheel out, when the machine started up and the planing table backed up on my arm and crushed it." Dr. Tait, who was called, found fully two-thirds of the forearm so mangled that it required the amputation which he performed that evening.

The contention of the defendant corporation that after this evidence was given the cause should have been taken from the jury by a peremptory instruction to find for the defendant, is based on the position that there was an evident assumption of risk by the plaintiff. Counsel concede that plaintiff's "complaints and the promises by the foreman to remedy the defects within a fixed and definite time might suspend the assumption of risk during that time," but insist that "after the expiration of that time plaintiff assumed the risk as if no promise had been made."

The question whether an injured servant assumed the risk of danger, is ordinarily a question of fact for the jury. Such assumption of risk becomes a matter

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of law to be asserted by the court, only, as we said in Grace & Hyde Company v. Sanborn, 124 Ill. App. 472, p. 487, when, "conceding all that the evidence tends to prove in favor of the plaintiff, it would be apparent to all reasonable minds that such dangers as the evidence thus tends to prove were incidental to and connected with his employment, that they were not concealed or latent but patent and obvious, that they were not extraordinary and unusual but usual and incident to the business engaged in as conducted by the defendant, and existed continuously during the plaintiff's employment, and when there is no evidence tending to show that plaintiff ever complained of them, or that the defendant had promised to remedy them, or that plaintiff had been ordered to incur them by some particular or special order at the time of the accident." Under these circumstances, if it is proven also that the plaintiff was at the time of the accident "engaged in the regular line of his duties and usual employment and that he was of mature age and of ordinary strength and intelligence, then the question whether he understood and appreciated the danger (such undertaking and appreciation being recognized by the Supreme Court as essential elements in the assumption of risk) is answered by a conclusive presumption and the assumption of risk becomes a matter for the court to assert as a matter of law—not a question of fact to be left to the jury."

The defendant insists that all these conditions are met in the present case with the exception that there is evidence tending to show that plaintiff did complain of the danger in question, and that the defendant had promised to remove it; but, as before indicated, it argues that as the promise of the foreman was a promise to remove the danger within a fixed and definite time, after the expiration of the time the whole situation was the same as though no such complaint or promise had been made.

It is unnecessary for us to discuss whether all the other conditions which would make this case one in

which the assumption of risk should have been held as a matter of law, were or were not met, for we do not agree with the contention of appellant concerning the effect of the complaint, promise and expiration of the time set by appellant for remedy.

The evidence tends to show that there were imperfections and defects not obvious and patent in the machinery and appliances, which the defendant was bound to furnish to the plaintiff in good repair and reasonably safe; that these imperfections and defects produced a dangerous condition of things, which was obvious; that the plaintiff complained of that obvious danger, not undertaking, however, to specify the particular imperfections and defects in the appliances; that the defendant, by its foreman, ordered the plaintiff back to the machine with a promise of a safe machine by the following Sunday—a day, of course, when the machinery was not to be in motion.

The words of the alleged promise vary somewhat in different versions in the evidence.

Plaintiff testified the foreman said, "he would make a new one on me Sunday," and afterwards assented to the cross-examining counsel's version—"He said, 'Go back and I will have a new machine for you by Sunday.' "

Calonder testified that the foreman said, "Never mind, boy, go back; I will have a new machine for you there by Monday."

The effect of this testimony is represented by appellee's counsel to be (appellee's argument, page 19) that the foreman said, "Go back to the machine; I'll make a new one of it by Sunday." While these were not the exact words given in either version in the record, we do not think they inaptly or inaccurately represent the evident meaning of the foreman's remark. What was said would hardly have been naturally interpreted by the plaintiff to mean that an entire new machine, so elaborate and complicated as the planer, was to be substituted for the old one, because of its auto-

matically starting at unexpected times; but that such changes, readjustments and repairs would be made as would in effect "make of it a new machine."

We do not think that the drastic and stringent doctrine which the defendant corporation urges, that because the defendant promised to repair by Monday and had not done so on Tuesday, the plaintiff had on Tuesday assumed the risk, notwithstanding the promise to repair; in other words, that because the foreman had not repaired on Sunday, the plaintiff was bound to suppose he never intended to do so, or at least did not intend to do so within a reasonable time, is sound as applied to the case at bar.

It is true that in *Gunning System v. LaPointe*, 212 Ill. 274, the opinion of the court contains the general statement—made wholly incidentally in the discussion of the subject of the effect of promises to repair—that "If the promise is to repair by a fixed time, then after the expiration of the time fixed the servant assumes the risk from the defects complained of;" but this was not applied to the case under discussion, or to any other particular instance. The real gist of the decision in the *Gunning System* case was that when there is no question of a fixed time within which the repairs are to be made, then "At and after the expiration of a reasonable time within which to make" them "if they are not made, and if the defects are open and known to the servant and no new promise is made and the servant continues the work, he assumes the risk incident to the defects of which he complained."

As in the *Gunning System* case the alleged promise fixed no time, the language just quoted expressed the point decided, while the preceding language about the promise to repair by a fixed time is *obiter dictum*. In its true meaning, as a general proposition, it is undoubtedly sound. We do not think, however, that the court meant that the character of the machine to be repaired, the circumstances under which the promise was made, the relation of the parties between whom

it was made, and all those things which throw light on how words are to be construed and understood, were to be disregarded in considering the question whether a servant subjected to dangers of which he had complained, is obliged in every case to consider a promise to repair by a certain day so literally that instantly on that day coming, be it soon or late, he must leave his job or assume all the risk of remaining. We are of the opinion that it is still a question whether the plaintiff was trusting for a reasonable or unreasonable time to the promise to repair. Under certain circumstances it might well be unreasonable to delay a moment beyond some specified time; in others, the "fixed time" might well imply some considerable grace beyond the very day named.

The whole context of the conversation might imply that an approximate rather than a precise time was meant.

The view we have presented is that which was taken in a precisely similar case by Mr. Justice Scofield of the Appellate Court in the Fourth District—I. C. R. R. Co. v. Creighton, 63 Ill. App. 165. The promise in that case was to repair an engine on the night of March 12th. The injury was received on the 13th. The court said: "The gist of the promise was that the engine should be repaired without delay, and appellee was justified in regarding this promise as continuing for a reasonable time beyond the night of the 12th."

There is an additional reason in the case at bar for not holding, as a matter of law, that plaintiff had assumed this risk after Sunday, the 22nd, in the direct and special order which the evidence tends to show was given him after his complaint, to go back to the machine to work.

In Anderson Pressed Brick Company v. Sobkowiak, 148 Ill. 573, the court, in speaking of the rule that a case might be taken out of the operation of the doctrine of assumed risk by a promise to repair, said: "The reason for this exception may be stated to be,

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that when the master has knowledge of the defects and promises to repair the same, he impliedly requests the servant to continue to work and" (implies) "that he, the master, will take upon himself the responsibility of any accident that may occur during that period."

If this be the true reason, it would be difficult to suppose that the implied taking upon himself by the master of the risk of anything injurious happening from the defects complained of was so limited to the precise moment as to end at twelve midnight on Sunday, the 22nd. If any element of reliance on this implied undertaking for a reasonable time after that precise moment was involved, we think it was for the jury to say whether that reasonable time included the day of the accident. If it were not, and were a question for the court, we should not be inclined to disturb its decision that it did.

Again, there is another and very strong reason why the proposition in the Gunning case, relied on by the appellant, cannot be considered applicable to the case at bar. That proposition clearly presupposes that the fact was entirely obvious to the injured party that no repairs and no additional precautions against the danger complained of had been made or taken between the promise and the injury. Such was the case in the Gunning case, in which the question of what was a reasonable time, when no time was fixed, seems to have been considered one for the court. But in the case at bar no such condition existed.

We do not find, in a careful search of the record, anything inconsistent with the hypothesis that the plaintiff in fact supposed that on Tuesday, December 24th, the planer had been so readjusted that the danger of automatic starting had been minimized or removed. It is, however, conceded, or rather claimed, by the appellant that there were no changes made in the planer or its adjustments before the accident nor since. The plaintiff was a minor, and although of some experience with machinery in connection with

his duties in the shop for several months, he had no special knowledge of machinery so far as appears, nor any such expertness as would warrant an assumption that he could at once determine by inspection that no change had been made in mechanism, adjustment or alignment, to remove a danger which might have been the result of a defect in any one or more of these things.

It is, however, further contended by the defendant that plaintiff was guilty of contributory negligence. This, defendant says, should have been held by the trial court as a matter of law, and the jury peremptorily instructed for this reason, if for no other. The contributory negligence of the plaintiff is said to be the inserting of his hand in the planer bed when no greater space existed between the edge of the table and the end of the machine, and his failure to use the foot trip to run the table back and give him more room. Under the evidence in the case as to the instructions given him about the place to keep his tools, as to the customs of the shop, and as to the condition of the foot trip and contingencies in its use, and perhaps even without evidence of any of these things, the question of contributory negligence was one for the jury.

Our conclusion is that there was evidence tending to prove the plaintiff's case, and that the trial court rightfully refused to take it from the jury.

Moreover, we do not think that the verdict is so against the weight of the evidence that a new trial should have been granted. The cause has been submitted to two juries with substantially the same result. All the instructions on the merits of the cause and the legal questions therein involved which the defendant asked for were given, the only instruction, except the peremptory one, which was refused being one on the duty of the jury to regard the law and the evidence. That instruction was unnecessary, superfluous and objectionable. Its refusal is not argued here to have been erroneous. No instructions were asked by the plaintiff.

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We do not think that another trial would result differently.

We do not think the court erred in its rulings on evidence complained of. They seem to us to be correct, but they would not be reversible error if they were not.

Substantial justice has been done in this case, we think, and the judgment of the Superior Court is affirmed.

*Affirmed.*

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**James F. Stepina v. The Conklin Lumber Company et al.**

Gen. No. 18,208.

1. **DAMAGES**—*when not awarded upon affirmance of appeal taken for delay.* Damages will not be awarded upon the affirmance of a decree where the appeal has been taken for delay where so to do would impose an additional burden upon one primarily liable to pay the decree who has not appealed.

2. **VARIANCE**—*what not fatal, in mechanic's lien proceeding.* A fatal variance does not appear where the pleading charged an entire contract to furnish certain merchandise and the proof showed a contract to furnish, at market prices, all such merchandise as the other party might order.

3. **VARIANCE**—*how question of, regarded in mechanic's lien proceeding.* The Mechanic's Lien Act is to be "liberally construed as a remedial act," and unless the variance is palpable and material, it will not be deemed fatal.

4. **VARIANCE**—*what not fatal, in mechanic's lien proceeding.* A fatal variance does not appear where the pleading charged a written contract and the proof showed a contract which was partly oral and partly written.

5. **VARIANCE**—*when will not defeat allowance of mechanic's lien.* A variance which is slight will not defeat the allowance of a mechanic's lien.

6. **CONTRACT**—*what deemed written.* A contract is deemed written where a written proposition is made signed by one party, accepted by the other who took the contract and entered upon the work.

7. **CONTRACT**—*when may be abandoned.* A party to a contract may abandon the performance thereof where the other party is in default.

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Mechanic's lien proceeding. Appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GABY, Judge, presiding. Heard in this court at the October term, 1906. Affirmed. Opinion filed May 31, 1907.

**Statement by the Court.** This is an appeal by James F. Stepina, individually and as trustee, from a decree of the Superior Court of Cook county in a mechanic's lien suit, brought by The Conklin Lumber Company on August 25, 1905, against one Frank S. Thomazin and Sophia Thomazin, his wife, James F. Stepina individually and as trustee, James J. Donlan, John J. Kratz, F. J. Schlitz, Tyler & Hippach, Wm. T. Gaines, Fred Holmberg, Knickerbocker Ice Company, Rudolph Goss, —— Goss, —— Bates and —— Lakin, all of which defendants were said by the bill filed in said cause to claim some interest in certain premises described as lots 287 and 288 in Downing & Phillips' Normal Park addition, in the east half of the northeast quarter of 29—38—14 east, etc., in Cook county, Illinois. These interests, however, if they existed, were claimed to have accrued subsequent to and to be subject to the lien of the said Conklin Lumber Company. The lien of the said lumber company was represented as arising from a verbal contract made July 25, 1904, between Frank Thomazin and the Conklin Lumber Co., by which the lumber company agreed to furnish Thomazin lumber and materials in such quantity and quality as Thomazin might call for during the construction and erection of two buildings about to be erected on the land above described, of which land Thomazin was then the owner. Three hundred and fifty-nine dollars and three cents was said to be the balance due the Conklin Lumber Company on this contract for the material furnished under it. The Knickerbocker Ice Company filed an answer in the nature of an intervening petition, claiming a lien for \$113.10 for brick, lime and cement furnished for the same buildings.

Tyler & Hippach, by a like answer, claimed a lien for \$64 for glass and glazing; William Gaines a lien

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of \$240 for plastering; Kratz & Schlitz one for \$143.54 for tinning, and Thomas Donlan one for \$130 for plumbing.

James F. Stepina first filed a general demurrer to the bill. This was overruled. He then filed an answer, in which he denied most of the various allegations of the original complainant's bill, and set forth that Frank Thomazin and Sophia Thomazin, being indebted to Stepina in the sum of \$1,600, on August 4, 1904, executed notes of that date to evidence the indebtedness and a trust deed to him of the premises described in the bill of complaint to secure said notes, which trust deed was filed for record on August 10, 1904, and was a first lien on said premises prior to any complainant might have; that on the same date the Thomazins were indebted in the further sum of \$1,800 to Stepina, and executed notes for that amount and a trust deed of the said premises to secure them, which deed was also recorded on August 10, 1904, and formed a second lien on the said premises, also, however, prior to any lien of the complainant.

The other defendants were either not found or defaulted. After replications were filed by the complainant, the cause was on February 9, 1906, referred to a master.

On the coming in of the master's report of his conclusions, with the testimony and exhibits, objections by Stepina and others, filed before the master and overruled by him, were ordered to stand as exceptions. They were, however, all overruled and the master's report confirmed. A decree was entered in accordance therewith, dismissing the petitions and denying the claims of Tyler & Hippach and the Knickerbocker Ice Company, but establishing the lien on all of the said premises of the Conklin Lumber Company for \$359.03, with interest, and \$80 for solicitor's fees, and the lien on all said premises of Kratz & Schlitz for \$143.49, with interest, and \$40 for solicitor's fees, both of said liens to be superior to the liens of Stepina under the trust deeds.

The decree gave also a lien to Donlan upon one of said lots for the sum of \$130 and interest, and \$40 for solicitor's fees subject to the liens of the Conklin Lumber Company and of Kratz & Schlitz, and subject to the lien of Stepina through the trust deeds as to the lot itself, but superior to it as to the building on said lot.

It gave to Gaines a lien for \$240, with interest, and \$55 for solicitor's fees, subject to the lien of the Conklin Lumber Company and of Kratz & Schlitz, and subject to the lien of the trust deeds of Stepina as to the lots but superior to said lien as to the buildings.

The decree also found the facts concerning the execution of the notes and trust deeds to Stepina to be as alleged in Stepina's answer and that the loans were what is commonly called building loans, and decreed that Stepina be given a lien on the premises involved, subject to the lien of the Conklin Lumber Company, and of Kratz & Schlitz, and subject to the lien of Gaines upon the building on each of the lots, and subject to the lien of Donlan on the building on lot 287.

From this decree Stepina appealed to this court. Here he has raised the same questions by his assignments as he did before the master and the chancellor by his objections to the master's report.

Although there are twenty-seven assignments of error they are condensed by counsel for complainant in his argument as follows:

A. The court erred in enforcing a lien in favor of the Conklin Lumber Company, because there was a variance (1) between the bill of the company and the statement of claim for lien filed in the Circuit Court Clerk's office in accordance with the statute; (2) between said bill and the proofs; and (3) between the statement of claim and the proofs.

B. The court erred in enforcing a lien in favor of Kratz and Schlitz, because there was a variance (1) between the intervening petition of Kratz & Schlitz and the proofs and (2) between their statement of claim and the proofs.

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C. The court erred in enforcing a lien in favor of Donlan because there was a variance (1) between the answer of Donlan and the proofs and (2) between his statement of claim and the proofs; and because Donlan abandoned the performance of his contract without justification.

The appellant has assigned specific errors as to the lien declared in favor of Gaines, but has omitted these assignments in his abstract and abandoned them in his argument. He asks in his brief for no relief against the judgment in favor of Gaines.

MASON & WYMAN, for appellant.

GUSTAVE E. BEERLY, WILFORD C. SHIPNES and WALTER F. HEINEMANN, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Of course the decree, so far as it is in favor of William T. Gaines, must be affirmed. Solicitors for Gaines ask that it should be affirmed with ten per cent. damages, since it is practically admitted by the course of the appellant that the appeal was taken as against Gaines only for delay. We should be willing to do this if the appellant's interests only were involved, but so to increase the amount of the adjudged lien in favor of Gaines would be to impose on the principal defendant, Frank S. Thomazin, who has not appealed, an additional burden, which we do not think it just to do.

The appellant makes the objection to the decree so far as it declares and enforces a lien in favor of John J. Kratz and F. J. Schlitz, doing business as John J. Kratz & Company, that a different contract was proven from that alleged in their statement of claim, filed under the law in the office of the clerk of the Circuit Court February 3, 1905, and from that alleged in their answer or intervening petition filed in this case December 15, 1905. The variance is said to be that in

the statement of claim and in the answer that contract was alleged to be an entire one to furnish a certain amount of hardware and other material for \$168.54, while the one proved was to furnish such hardware and other material as the defendant might order at market prices.

We do not think there is any such variance as is charged; certainly there is no fatal variance.

The statement of claim says that "on or about August 2, 1904, F. S. Thomazin made a verbal contract with the claimants, John J. Kratz and Company, to deliver certain hardware and goods and merchandise as from time to time selected for the building then being erected on said real estate;" also that "the claimants were to complete the delivery within a reasonable time after the goods were ordered;" also that the claimants "furnished hardware goods and materials on said premises of the value of one hundred and sixty-eight 54/100 dollars," according to a schedule inserted.

The answer says the contract was a verbal one "to furnish work, labor and material, hardware, tinning and trimming supplies, and to do the work and labor required in installing said tinning work and other work connected therewith in and about" the buildings in question; that the claimants furnished material and labor under said contract within the time specified, and that "under the terms of said contract they were to receive \$168.54," and that the "material and labor were reasonably worth \$168.54."

The proof was that Thomazin selected the hardware that he wanted, and got it as he wanted it; that it amounted, including gutters and downspouts put up at an agreed price, to \$168.54; that the work and material were accepted and pronounced satisfactory by him.

The mechanic's lien law could hardly be said to be "liberally construed as a remedial act," as in itself it is provided that it shall be, if a fatal variance could be detected here.

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So far as the decree declares and provides for the enforcement of a lien in favor of Thomas Donlan, the same objection is made as to the Kratz and Schlitz claim, namely, that there is a variance between the statement of claim and the proofs, and between the answer and the proofs; and in addition the objection is made that Donlan lost any lien he might otherwise have had by abandoning his contract without justification.

The gist of the argument of appellant in favor of the first objection is, that the contract is alleged in the statement and in the answer to be a written one, while the contract proved is an oral one.

Appellant concedes that a contract was made between Thomazin and Donlan, but says that it was not written. The contract was not set out *in haec verba* in the statement of claim for lien, but the terms of it are stated as they appear in the copy set forth in the answer and in the original introduced in evidence. Donlan made a proposition to Thomazin in writing, headed "Contract for Plumbing, Gasfitting and Sewerage at Nos. 7155 & 7159 Peoria St." It contained a date, and the items of plumbing required and to be furnished for two cottages, and concluded: "This labor and material is to cost \$410.00—\$205.00 for each cottage, of which \$75 on each cottage is to be paid plumber when job is roughed in, and \$130 on each cottage, more is to be paid him when the plumbing work is finished."

This paper Thomazin signed "F. S. Thomazin" and returned to Donlan, who thereupon proceeded to do work and furnish material under it.

It is said by appellant that this is not a written contract because it does not disclose any party to it but Thomazin, and that it is wholly indefinite in not stating what has to be done. If further evidence in the case makes it a contract, it is said, it is not a written contract, but one partly in writing and partly oral, and therefore, "in legal effect an oral contract." To this proposition are cited authorities to the effect

that to make a contract "written," the parties and the terms and provisions thereof must be ascertainable from the instrument itself.

In the present case the "plumber" is mentioned as the party who is to be paid, and it is plain that the owner of 7155 and 7159 Peoria street is the other party, and that the work and material to be furnished and the amounts and times of payment are set forth. The paper is signed by the "owner," and was retained and presented by a "plumber," who swears he made the proposition, took the contract, and entered upon the work. We think the contract was in legal effect a "written" one sufficiently to bring it within the description of it made in the statement and answer. But even if it did not answer that description, because it was partly oral and partly written, there would be no variance fatal to the right of recovery of a decree in this case.

Under the Mechanic's Lien Act of 1903, no distinction is made between oral and written contracts. The rights to a lien under them are the same. The denomination, therefore, of the contract as a written one was wholly immaterial. If it was a mistake, it injured no one. The document was fully described in both statement and answer, and there was no surprise in its production in the form in which it existed. To defeat a lien on such an objection would certainly not be to construe the act "liberally as a remedial act."

The other objection, that Donlan unjustifiably abandoned the job before completion, depends on the theory that \$150 was to be paid to Donlan when the plumbing work was roughed in on both cottages, and \$260 when the plumbing work was entirely finished on both cottages. We do not so read the contract. It seems plain to us that it means that \$75 was to be paid as soon as the roughing in of the work on one cottage had been done and \$130 more when the work had been entirely finished on that cottage. Consequently when the plumbing work in one cottage had been entirely completed the final payment of \$130 was

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due on that cottage. As it was not paid, Donlan was entitled to abandon his work on the contract and proceed to enforce his lien as provided by section 4 of the Act.

The objection made to the decree, so far as it declares and provides for the enforcement of a lien in favor of the Conklin Lumber Company, is based entirely on an alleged variance between the bill of complaint filed by the company, the statement of lien filed in the Circuit Court clerk's office, and the proofs, each of these essential factors being said to differ from the other two.

The master in his report, in passing on this objection, disposed of it by saying: "While there was some slight variance between the pleadings and the proof, I do not consider it sufficient reason to recommend the disallowance of the lien," and we are inclined to affirm the court's action in confirming this report with much the same brevity in the reasons.

The statement of claim said that "the materials were not furnished in pursuance of any express contract, but upon orders given from time to time by said Thomazin during the progress of the construction," etc. The bill alleged that "a verbal contract was entered into by which lumber was to be furnished in such quantity or quality as Frank S. Thomazin might need, etc., and as he might from time to time call for or order during the erection of said buildings, etc., and that Thomazin agreed to pay the usual market price; or such price as might be agreed on at the time of ordering," etc.

There is no variance worth noticing in these documents. But it is alleged that the proof varied from both statement and bill, in that it showed an express contract for a certain amount of lumber for a specific price, namely, \$533.78, and not, as claimed by statement and bill, a contract for lumber in such quantity as might be needed at such price as might be agreed on when ordered.

It is true that Prosser, the manager of the company, testified that when Thomazin came to the office of the company first, he said that he had figures from one of the company's competitors, and that thereupon Prosser agreed with him as to prices, and an estimate, as Prosser later calls it, and as it is denominated in the paper itself, was made out of prices which Thomazin agreed to pay for different items of lumber. The gross amount of this estimate was \$533.78, and it bore a memorandum signifying that two and one-half per cent. was to be deducted from that price. The lumber actually from time to time ordered and furnished did not include items of this estimate amounting to \$56.70, and did include lumber which was not mentioned in the estimate to the amount of \$136.13. On the basis of the lumber actually furnished, and crediting the amount paid, the Conklin Lumber Company under date of March 14, 1905, presented a bill to Thomazin for \$359.03, and he placed upon it a certificate that he ordered from the Conklin Lumber Company lumber and building materials amounting to three hundred and fifty-nine 00/100 dollars, and that they delivered same per his orders, and that it was used in his buildings, etc. There is no evidence to the contrary.

The converse of the contention made by the appellant as to the Donlan claim seems to be made here. It is that the estimate, although unsigned by either party, and not in fact carried out in its entirety, was an express written contract, and that as it was wrongly described as something else in the statement and bill, it cannot be made the basis of the lien decreed. We agree with the master and the court below that there is no variance which should defeat the lien. Giving the statute a reasonable construction, we see no reason in it why the Conklin Company's claim should not be allowed under the condition of the pleadings and proofs.

The decree of the Superior Court is therefore affirmed.

*Affirmed.*

Gibbs v. Van Derslice.

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**Seth Gibbs v. Walter J. Van Derslice.**

Gen. No. 13,817.

1. **PEREMPTORY INSTRUCTION**—when transcript does not show giving of. A recital in the bill of exceptions that the court instructed the jury as follows, does not show that the court actually peremptorily instructed the jury:

"And now at the close of all the evidence comes the plaintiff and moves the court to give to the jury the following instruction: 'The court instructs the jury to find the issues for the plaintiff and return a verdict finding that the defendant, Seth Gibbs, is guilty of unlawfully withholding possession of the premises described in the complaint herein from the plaintiff, Walter J. Van Derslice.'"

2. **FORCIBLE DETAINER**—when service of demand for possession sufficient. Notwithstanding a notice may be addressed to two parties, it is sufficient if it is served upon the one upon whom the demand should have been made.

3. **FORCIBLE DETAINER**—function of complaint. In an action of forcible detainer instituted before a justice, the complaint is jurisdictional, but after the appeal the absence of the complaint may be supplied if a complaint existed before the justice.

4. **FORCIBLE DETAINER**—effect of informality in complaint. An informality in a complaint in an action of forcible detainer does not invalidate the judgment after a trial has been had on the merits.

Forcible detainer. Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1906. Affirmed. Opinion filed May 31, 1907.

HENRY J. GIBBS and JAMES N. TILTON, for appellant.

JOHN A. IRBMAN, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This is an appeal by Seth Gibbs, the defendant below, from a judgment of restitution of certain premises known as number 1141 North Fortieth avenue, in favor of Walter J. Van Derslice, the plaintiff below.

The action, which was one of forcible detainer, was begun by Van Derslice before a justice of the peace

against Seth Gibbs and Mrs. J. Gibbs. The transcript from the justice's docket filed in the Circuit Court recites that a complaint was filed August 16, 1905, and summons ordered and issued on that day. The summons was served on both defendants by leaving a copy thereof with Mrs. J. Gibbs at the last and usual place of abode of both defendants and informing her of the contents thereof.

Before the case was tried, at least before judgment was asked or rendered, the plaintiff dismissed the suit against Mrs. J. Gibbs. The plaintiff and the defendant, Seth Gibbs, being in court, witnesses were sworn and examined, and the justice found that said Seth Gibbs was guilty of forcible detainer of the premises described in the complaint and gave judgment in favor of the plaintiff, Van Derslice, against said defendant, Seth Gibbs, for restitution of the premises described in the complaint and for costs. From this judgment the defendant appealed to the Circuit Court. In the Circuit Court the case came on to be heard before the court and a jury at the March term, A. D. 1906. Evidence was there heard, and witnesses sworn and examined on the part of both plaintiff and defendant. The record states that after all the evidence was introduced, the court instructed the jury in behalf of the plaintiff as follows:

"And now at the close of all the evidence comes the plaintiff and moves the court to give to the jury the following instruction: The court instructs the jury to find the issues for the plaintiff and return a verdict finding that the defendant, Seth Gibbs, is guilty of unlawfully withholding possession of the premises described in the complaint herein from the plaintiff, Walter J. Van Derslice."

This statement of the record may technically import verity, but it is on its face absurd. The court probably instructed the jury to find the issues for the plaintiff, etc., but it did not instruct them merely that the plaintiff moved for that instruction. If it did, of course, it was equivalent to no instruction at all. If we

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were forced to a conclusion in this case, that the court ought not to have instructed the jury peremptorily, but should have left it to decide for itself the issues, we could not, from this record, assume that the jury had been so peremptorily instructed. But we do not think that such an instruction would have been error. The jury, whether it is to be considered instructed or uninstructed, found a verdict for the plaintiff and that the defendant, Seth Gibbs, was guilty of unlawfully withholding possession of the premises described in the complaint. A motion for a new trial was overruled by the court and judgment was given on the verdict, from which judgment the present appeal was taken.

The first objection to the judgment made by appellant is that no demand, as required by the statute, was served upon Seth Gibbs. The notice addressed to both Seth Gibbs and his mother, Mrs. J. Gibbs, was served by one F. A. Cummings, by leaving one copy with Mrs. J. Gibbs. "The presumption is," the appellant's counsel says, that "he served it on her for herself and not as service upon appellant." The case of *Bell v. Bruhn*, 30 Ill. App. 300, is directly in point against this contention. What the court said was true in that case is true in this: "Notwithstanding the fact that it was addressed to both of them, the service was precisely such as the statute requires if it had been addressed to him alone, and it is to be presumed he got it."

The second objection of appellant is that there is no proof that there was a complaint ever in existence. The existence of a complaint being jurisdictional (*Redfern v. Botham*, 70 Ill. App. 253), there can be, under these circumstances, no valid judgment, counsel say.

The Circuit Court allowed a complaint to be restored to its files, on the theory that such a complaint had existed in the justice court, and been lost after being sent to the Circuit Court. The transcript from the justice recited that a complaint had been made be-

fore him. There was a certificate of the justice for the Circuit Court that the transcript and *papers accompanying* it contained a full and perfect statement of all the proceedings before him. There was evidence the judge of the Circuit Court found that a paper had been attached to the transcript and he presumed it to be the complaint. Such presumption was unnecessary, we think, however. It was the jurisdiction in the justice which required the complaint. On appeal the absence in the Circuit Court of the actual complaint filed before the justice is not fatal. Proof may be made there *was* such a complaint, and its loss or absence supplied.

This is what this court implied in *Redfern v. Botham, supra*, and in *Leiferman v. Osten*, 64 Ill. App. 578, and it is exactly what was done in the case at bar, by the testimony of the witness Cummings, and was sufficient.

Another objection is that the complaint as restored was signed by Cummings and not Van Derslice. The complaint may be presumed, in absence of proof to the contrary, to have been autographic by Cummings. The writing of his name by himself, with a description of his capacity, in the body of this instrument, may be considered in connection with the signature to show both that capacity and the fact that it was brought to the attention of appellant. The complaint may be made by an agent. *Patterson v. Graham*, 140 Ill. 534.

If the complaint was informal, it does not invalidate the judgment after a trial on the merits had under it. *Willerton v. Shoemaker*, 60 Ill. App. 127.

Finally, it is insisted that on the merits the cause was wrongly decided, that the rent was paid until September 4, 1905, and that no right of dispossession under a five days' notice existed. We do not think it necessary to detail or discuss the argument by which this contention is sought to be sustained. It is ingenious, but not sound. It rests on the receipt which Ellis gave August 8, 1905. Even the purported signature of a receipt may be explained.

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The fact appears plainly enough that the defendants were in arrears for rent due to Van Derslice, and the court was right in instructing the jury, as we suppose he did, to find for the plaintiff. As we have said, however, the record importing verity, does not contain anything which shows that the jury were not left free to decide. Assuming that they were, they decided right.

The judgment of the Circuit Court is affirmed.

*Affirmed.*

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**Patrick O'Donnell, Administrator, v. John M. Healy.**

Gen. No. 18,281.

1. STATUTES—*when not construed as retrospective.* A statute will not be construed as retrospective in its operation unless a purpose to give it retrospective force is expressed clearly and positively, or is to be inferred by necessary, unequivocal and unavoidable implication from the words of the statute, taken by themselves and in connection with the subject-matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question of such intention.

2. INJURIES ACT—*one-year limitation construed.* The amendatory act of 1905 did not prescribe a condition to the right of action but fixed a limitation, which limitation is not retrospective in its operation.

3. CAUSE OF ACTION—*what is, in action for death caused by alleged wrongful act.* The cause of action is the negligence which is alleged to have caused the death of the plaintiff's intestate, and the statute commenced to run at the time of the death.

Action in case for death caused by alleged wrongful act. Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1906. Reversed and remanded. Opinion filed May 31, 1907.

B. J. WELLMAN and McGOORTY, POLLOCK & LOEB, for appellant.

GORHAM & WALES, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant, as administrator of the estate of John P. McGinn, deceased, sued appellee for negligence, which it is alleged caused the death of his intestate. The appellee pleaded the general issue, and also a special plea, in substance that the supposed causes of action in the declaration mentioned did not, nor did any of them, accrue to the plaintiff, at any time within one year before the commencement of the suit. The plaintiff demurred to the special plea; the court overruled the demurrer, and the plaintiff electing to stand by the demurrer, the court rendered judgment for the defendant for costs.

The contention of the defendant's counsel is, that the action was barred by section 2 of the act of 1853, as amended by the act of 1903, which contains these words: "Provided, that every such action shall be commenced within one year after the death of such person." Hurd's Rev. Stats. 1905, chap. 70, sec. 2. The act of 1853 is as follows:

"Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and

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shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of \$5,000: Provided, that every such action shall be commenced within two years after the death of such person.”

Section 1 of the act of 1853 is as originally passed, but section 2 of the act was amended by act approved May 13, 1903, in force July 1, 1903, so as to read as follows:

“Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law, in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person not exceeding the sum of ten thousand dollars: Provided, that every such action shall be commenced within one year after the death of such person. Provided further, that no action shall be brought or prosecuted in this state to recover damages for death occurring outside of this state, and that the increase from five thousand to ten thousand dollars in the amount hereby authorized to be recovered shall apply only in cases when death hereafter occurs.”

The plaintiff's intestate died July 3, 1901, and the suit was commenced July 2, 1903, the next day after

the act amending section 2 of the act of 1853 went into force, and one day before the expiration of two years from the death of McGinn. Counsel for appellee contend that, as no action could be maintained at common law, the act giving the action conferred jurisdiction, and that it is, by the statute as amended, a condition of the right to maintain an action that suit shall be brought within one year from the time of the death, and that the provision of section 2, as amended, is not a limitation, but a condition, on performance of which the right of action depends, and cites, in support of these contentions *Dare v. Wabash C. & W. R'd Co.*, 119 Ill. App. 256; *Staunton Coal Co. v. Fischer*, *id.* 284; *Spaulding v. White*, 173 Ill. 127, and *Sharp v. Sharp*, 213 Ill. 332. It is well settled that such action as the present could not be maintained at common law, but only by virtue of a statute. The decision in *Dare v. Wabash*, etc., *R'd Co.*, *supra*, was similar to the present case, in that the suit was commenced within two years from the date of the death of the plaintiff's intestate, and not within one year from such date, and section 2 of the statute, as amended, was in force when the suit was commenced. The Appellate Court of the Fourth District held that the action could not be maintained, and also, in *Staunton Coal Co. v. Fischer*, *supra*, so held, under like circumstances. In both cases the court cited and relied on the decision in *Spaulding v. White*, 173 Ill. 127.

Section 7 of "An act in regard to Wills," approved March 20, 1872, in force July 1, 1872, provides as follows:

"Sec. 7. When any will, testament or codicil shall be exhibited in the county court for probate thereof as aforesaid, it shall be the duty of the court to receive probate of the same without delay, and to grant letters testamentary thereon to the person or persons entitled; and to do all other needful acts to enable the parties concerned to make settlement of the estate at as early a day as shall be consistent with the rights

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of the respective persons interested therein; Provided, however, that if any person interested shall within two (2) years after the probate of any such will, testament or codicil in the county court as aforesaid appear, and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the Circuit Court of the county wherein such will, testament or codicil shall have been proven and recorded as aforesaid according to the practice in courts of chancery in similar cases; but if no person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all of the parties concerned, saving to infants, or *non compos mentis*, the like period after the removal of their respective disabilities. And in all such trials by jury as aforesaid said certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence and to have such weight as the jury shall think it may deserve."

Section 7 was amended by act approved May 15, 1903, in force July 1, 1903 (Hurd's Rev. Stat. 1903, p. 1906, Sess. Laws 1903, p. 355), the sole amendment being that the words "one year" were substituted in the section for the words "three years." In Spaulding v. White, the will was probated March 29, 1894, and the bill to contest it was not filed till the March term, 1897, and the court held that the bill could not be maintained, because not filed within one year from the time the will was admitted to probate. We think there is a material distinction between section 7 of the statute in regard to wills and the statute in question in this case. By section 7 as originally passed and as amended, the right to file a bill to contest the validity of a will is, in terms, conditioned on an appearance and the filing of the bill within the time specified. The language is, "provided, however, that if any person interested shall, within three years, or within one year, by the amendment, after the probate of any such will,

testament or codicil in the County Court, as aforesaid, appear, and by his or her bill in chancery contest the validity of the same, an issue of law shall be made up," etc. By the section the right to file a bill does not accrue until there is an appearance and a filing of the bill within the time specified. In other words, appearance and the filing of a bill after probate of the will, and within the time specified, are, by section 7, conditions precedent to the exercise of the right to contest the validity of the will. Without such appearance and a bill filed, the court was without jurisdiction to proceed.

In addition section 7 provides that "if no person shall appear within the time aforesaid, the probate shall be forever binding and conclusive on all of the parties concerned, saving to infants or persons *non compos mentis* the like period after the removal of their respective disabilities."

Section 1 of the act in question in this case is the same as it was when passed in 1853, and in cases where the death of a person shall be caused by the wrongful act, neglect or default of another person or corporation it grants a right of action against the person who or the corporation which would have been liable had death not ensued.

This right of action is granted unconditionally, and in express terms by the section, in this essentially differing from section 7 of the act in regard to wills, which, as we have seen, annexes to the grant a condition which must be complied with before the will can be contested.

To sustain the contention of counsel for appellee would be to give retrospective effect to section 2 of the act, as amended by the act of 1903. There is no language in the section which warrants such construction. The general rule is that "no statute is to have a retrospect beyond the time of its commencement." Potter's Dwarris on Statutes and Constitutions, p. 162. In Endlich on the Interpretation of Statutes, section 271, it is said: "They are construed as operating only

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on cases or facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended." In the same section the author says: "A construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal and unavoidable implication from the words of the statute, taken by themselves and in connection with the subject-matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question of such intention."

The Supreme Court in *Walker v. The People*, 202 Ill. 34, 40, cite *Wood on Limitations*, p. 28, to the same effect. (By mistake "Thompson" is printed instead of Wood.) In *Wall v. C. & O. R'd Co.*, 200 Ill. 66, the court held, in effect, that the provision in section 2 of the statute as passed in 1853, was a limitation. In that case, the plaintiff's intestate suffered an injury May 24, 1896, which resulted in his death, and it appearing on the face of the declaration that more than two years had elapsed since the injury, the defendant demurred, relying on the provision in section 2, requiring suit to be commenced within two years from the time of death. The court held that the question whether the plaintiff was barred by the statute could not be raised by demurrer, but only by plea, so as to give the plaintiff an opportunity to plead any special matter which would prevent the bar of the statute. The court, in several places in the opinion, refers to the two-year provision as a statute of limitation, as we think it clearly is.

Section 70 of the administration act, as originally passed, limited the time for exhibiting claims against an estate to two years, unless creditors should find other estate of the deceased not inventoried or accounted for by the executor or administrator. *Hurd's Rev. Stat. 1901*, p. 116. By an act in force July 1, 1903, the section was amended by limiting the time for

exhibiting claims to one year. Hurd's Rev. Stat. 1905, p. 116.

In *Hathaway v. Merchants' Trust Co.*, 218 Ill. 580, it appeared that the Merchants' Trust Co. filed its claim in the Probate Court May 2, 1904, nearly two months before the amendatory act of 1903 took effect. The Probate Court allowed the claim July 25, 1904, after the mandatory act took effect. The defense was that the claim was barred by the act of 1903. Stating the question to be decided, the court say: "The sole question is whether the claim of defendant in error is barred by the amendment of May 15, 1903, it not having been filed within one year from the date of the issue of letters testamentary, or whether the statute which existed prior to the amendment was in force as to such claims, entitling the claimant to two years from the date of the issue of letters in which to file its claim." The court held that the statute which existed prior to the amendment was in force as to the claim, and said: "The statute will only be given a retroactive effect when it was clearly the intention of the legislature that it should so operate. (*Fisher v. Green*, 142 Ill. 80.) And even where this intention clearly appears, it will not be given effect if to do so would render it unreasonable or unjust. If a reasonable time is given for bringing a suit or filing claims after the amendment takes effect, it may be valid and binding. *Ryhiner v. Frank*, 105 Ill. 326, 19 Am. & Eng. Ency. of Law, 2nd ed., 168, 169; *Walker v. People*, 202 Ill. 34, quoting from *Wood on Limitation of Actions*, page 28, by mistake printed as *Thompson on Limitation of Actions*." See, also, *Brennan v. Electrical Installation Co.*, 120 Ill. App. 461, 470.

Counsel for defendant's special plea recognizes the one-year provision is a limitation. It is, as heretofore stated, that the cause of action did not accrue within one year next before the commencement of the suit. The proposition of defendant's counsel, that the cause of action accrued at the time of commencement

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of the suit, is unsound. The cause of action is the negligence which is alleged to have caused the death of the plaintiff's intestate, and his death. *Leroy v. City*, 81 Ill. 114. We think it unnecessary to pursue the subject further. The judgment will be reversed and the cause remanded.

*Reversed and remanded.*

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#### Thomas Y. Scott v. Litta Cohn.

Gen. No. 18,295.

1. **CUSTODY OF CHILD**—*prime consideration in awarding.* After divorce the prime consideration which determines to whom the custody of the issue of the marriage should be awarded, is the good of that issue.

2. **CHANCELLOR**—*when may not decide question of custody of child upon independent investigation.* A chancellor cannot determine the question as to the custody of a child upon an independent investigation made by him, through agreement of counsel for the parties, especially where the investigation was not personally made.

**Divorce.** Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1906. Reversed. Opinion filed May 31, 1907.

**Statement by the Court.** Appellee and appellant, prior to February 10, 1902, were husband and wife. At that date the Circuit Court rendered a decree, at the suit of appellee, divorcing her from appellant. They had one child, the sole issue of their marriage, Lake Y. Scott, who was six years of age February 27, 1906. The decree of divorce contains the following: “It is further ordered by the court that the sole care, custody and control of the child of the parties hereto, Lake Y. Scott, be, and the same is hereby given to the said defendant, Thomas Y. Scott, until the further order of the court.” It appears from the evidence that, by arrangement between the parties, the defendant was to have the custody of the child, and for that and other considerations, he did not defend

the suit. At the time the decree was rendered, appellant was living in Springfield, in this state, and appellee was in the city of Chicago.

November 29, 1905, appellee filed a petition in the divorce cause, in the Circuit Court, in which, after setting up the prior proceedings, as above stated, it is averred, in substance, that appellee, since the divorce, was married to Samuel A. Cohn, who is engaged in the restaurant business, and that she and Cohn were residing at 3356 Indiana avenue, in the city of Chicago, and that since the entry of the decree appellant has married, and the child has resided with him in Springfield, in this state; that at the time of entry of the decree appellee was not able to care for herself and the child, but is now able to care for him, to which her husband has consented. It is also averred that she has been permitted to see the child but seldom, and on such occasions has had to go to Springfield, Illinois, to see him, and that appellant has refused to permit the child to visit her, and the child is taught to regard another, not of kin to him, as his mother. A modification of the decree is prayed, allowing the appellee the custody and care of the child for a part of each year. Issues were joined by answer and replication; the cause was heard on evidence produced in open court, and, July 17, 1906, the court, after finding in favor of appellee, decreed as follows:

"It is therefore ordered, adjudged and decreed that in said decree entered in this cause on the 15th day of December, A. D. 1901, the following words, 'It is further ordered by the court that the sole care, custody and control of the child of the parties hereto, to wit, Lake Y. Scott, be and the same is given to the defendant, Thomas Y. Scott, until the further order of this court,' be struck out, and henceforth are of no further force and effect.

"And it is now here further ordered and decreed by the court, that the care, custody and control of the said Lake Y. Scott, a minor child of the said Litta Scott, now Litta Cohn, and the said defendant, Thomas Y. Scott, be and the same is now hereby, on the 17th

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day of July, A. D. 1906, given to the said Litta Cohn on and from the date of the entry of this decretal order, for, during and until the first day of September, A. D. 1906.

“And it is also ordered and decreed that said defendant shall, on the first day of July of each year hereafter, permit, without interference or hindrance, said Litta Cohn to take care and custody of said child and to bring him to her house in the city of Chicago, and there remain until the last day of August of each year, the said Litta Cohn being further given until the time last aforesaid, of each year, the care and custody of said child, Lake Y. Scott.

“It is further ordered that both or either of said parties shall be at liberty from time to time to invoke the aid of this court to enforce this part of this decree and order, or to alter, change or amend the same.”

PEASE, SMIETANKA & POLKEY, for appellant.

EDWARD H. MORRIS, for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

It is assigned as error that the decree is contrary to the evidence, and that the court erred in awarding the custody of the child to appellee during the months of July and August of each year. The appellant is a druggist, and before and since the rendition of the decree of divorce has resided in Springfield, in this state, and about November 1, 1904, he married again, is keeping house, and receives a salary of \$80 per month from a Springfield firm engaged in the drug business. A short time before the decree of divorce was rendered, while appellee was living in Chicago with her married sister, appellant, in response to letters received from appellee's sister and brother-in-law, came to Chicago and got the child, with appellee's consent, and took him to his, appellant's, mother, Mrs. Martha Scott, who owns and resides on a farm about two

and one-half miles from Berlin, Illinois, which latter place is in Sangamon county, and about seventeen miles from Springfield. Appellant's sister and brother-in-law, Mr. and Mrs. Robertson, and their children, also live on the farm with Mrs. Martha Scott. The child, Lake Y. Scott, has lived with his grandmother ever since he was taken to her place before the divorce. Appellant pays ten dollars per month for his board and clothes him. The uncontroverted evidence is that the child is well cared for and is strong, contented and happy. Mrs. Martha Scott has an excellent reputation and is respectably connected. The following witnesses testify to appellant's reputation:

H. Clay Wilson: Have known Scott eight or ten years. He stands fairly well as a citizen in the community, is amply able to care for and educate his child; has never been idle since I have known him, always stuck to his business.

G. W. Hulett: Have known Scott seven years; he worked for me four and one-half years. He is a respectable citizen and amply able to take care of and educate his child.

Six other witnesses testified to the same effect. This evidence is not controverted. Appellee testified that she had nothing to say against the character of appellant or of those caring for the child. That the child is well and amply provided for, and is strong, healthy and happy, and is surrounded by a good moral atmosphere, is abundantly proven, and there is not a scintilla of evidence to the contrary.

Appellee testified that since the decree of divorce was rendered, she visited the child at her own expense, going at first about every month; that the child was living with his grandmother, about seventeen miles from Springfield, and when she saw him he did not recognize her as his mother; that he called his grandmother mama, and that she has asked to have the child visit her in Chicago, which has been refused.

Appellant testified that he instructed his people that he wished them to treat appellee properly when

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she visited the child; that he thought this no more than right as she was the child's mother, and that there was no restriction placed on her as to visiting the child. Mrs. Robertson, appellant's sister, who, with her husband and children, lives with Mrs. Martha Scott, testified: "I have known Mrs. Litta Scott about eight years. She has been out to see the child. She generally came about one o'clock and left at four. The last time she was there, she stayed fifteen minutes; the train was late. She would stay several days in Springfield. I said to her, 'I should think you would stay longer with your child.' She said, 'I have friends in Springfield, and I cannot stay longer with him.' We always treated her kindly and made her welcome. She seemed glad to see the child, but there was no emotion when she would leave. She was out for the last time in August, 1904. Sometimes she bought him toys and two or three times she bought him candy. She has never written but once to my mother about the child. She has never written to him. The child has been with us four years, the first of last month."

We think it unnecessary and inexpedient to refer specially to the evidence in respect to appellee's manner of life and conduct since the divorce and since she became acquainted with him whom she now calls her husband. Suffice it to say that there is not a particle of evidence in the record tending in the least to prove that she is a fit person to have the care and custody of the child for two months in each year or for any time. The evidence tends to prove the contrary. Counsel for appellee does not, in his argument, rely on any evidence in the record, aside from financial ability, as tending to show that appellee is a fit person to have the custody of the child, or that it would be to his interest, in any way, to be transferred from the custody of appellant to that of appellee for any time. Counsel for appellee contends that counsel for the parties, respectively, agreed that the chancellor might investigate for himself and decide accordingly,

and that the court so did. In support of this contention the following is relied on:

February 17, 1906, after the evidence was all in and argument heard, the following occurred:

"The Court: It has gotten up to this point, whether the extent to which Mr. Cohn has been shown by the evidence is sufficient evidence to say that his home there would be an improper place for this child to be because he has been shown to be a gambler. That is the way it seems to me, and I was going to make this suggestion. I will investigate this further; if it is true, and so remains, then the child ought not to go there.

Mr. Pease: If what, your Honor?

The Court: If what I just stated is true then the child ought not to go there, but if further examination shows, nevertheless, that the surroundings and the home life would be the proper place for a young boy of that age to be for a reasonable time during vacation, why, I think he ought to go.

Mr. Morris: Does your Honor say you want further evidence?

The Court: I don't know whether I will ask you to get it or not; I may be able to find out myself.

Mr. Morris: That is right, your Honor, you can make any investigation, any suggestion that we can make; we will be glad to assist the court.

The Court: The court can make the investigation in its own way in reference to Mr. and Mrs. Cohn's home life.

Mr. Morris: Nothing pleases me better if your Honor comes to that conclusion.

Mr. Pease: That is perfectly satisfactory to me.

The Court: I don't know when I ever decided a case with so much satisfaction.

Mr. Morris: Investigation as to the condition of home life.

The Court: I think that ought to be done.

Mr. Pease: I think your Honor is putting the mat-

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ter not only on a sound legal principle, but sound common sense.

The Court: In the meantime Mr. Scott can take the boy to his home and put him in school. What school are you going to send him to?"

July 17, 1906, the following occurred:

"Mr. Pease: I don't know what investigation your Honor has made in the matter. As I stated the other day, I presume the amount of work your Honor has done the last two months, you have not much time to investigate this matter.

The Court: I have my own way of doing it. I have not made a personal investigation.

Mr. Pease: This all happened after the hearing of March 1st. Of course, I knew that Judge Walker was too busy to go out and investigate this household, although the police department of this city can furnish you all the information you want with regard to this man here.

Mr. Morris: You are asking the court to try a matter between the landlord and tenant.

Mr. Pease: I simply state to the court the head of the gambling detail can furnish the necessary information, or the clerk at the Harrison street station.

The Court: I have probably as good means of information as any man in Chicago, I think. I was corporation counsel of Chicago for four years, and I was alderman for two terms before that, and if anybody can show me anything about the police department I would like to find it out. I have caused to be made a very thorough investigation as to Mr. Cohn, and I am very well satisfied that he is all right. I know all about him. Whatever was brought out in this hearing is no surprise to me.

She seems to show it now, whether she showed it before or not; she is showing it now. All that remains for me to do is to find out whether the surroundings of her home are a proper place, and from what I hear of Cohn, I am very well satisfied that that child will not be injured in any way.

Mr. Pease: What have you heard of her?

The Court: What have I heard of her?

Mr. Pease: Yes.

The Court: Since then, nothing at all."

It is apparent that the chancellor made no personal investigation whatever. He expressly so says, and we are asked to decide on what the court may have heard from others, not under oath, whose statements do not appear in the record, and this relating only to Mr. Cohn, of whom the court says, "I am very well satisfied that he is all right." Asked what he had heard of appellee, since the evidence closed, the chancellor said, "Since then, nothing at all."

Counsel for appellant say that the judge determined the issues, not only by the evidence heard in open court, but by the investigation which he caused to be made. We can only determine the issues by the evidence produced in open court. This is not like a condemnation case, in which, by the Eminent Domain Act, the jury, on request of either party, may view the premises to be condemned, and their view is evidence. If the chancellor might decide partly on an investigation made out of court, such as it is claimed was made in this cause, then he might decide wholly, on such investigation, the only difference between the two cases being not in kind, but in degree. No agreement between counsel, such as is claimed to have been made, can bind the minor, whose interest is the main question to be considered.

In 2 Bishop on Marriage and Divorce, under the sub-title, "The custody independently of Divorce and Divorce proceedings," parag. 1161, p. 453, it is said: "The good of the child is universally deemed to be the leading consideration, to which the claims of all other persons must yield on sufficient pressure;" and the same author, in parag. 1193, p. 464, under the next sub-title, "The custody on and after the Divorce," says: "It is both law and common sense, that the superior right goes with the superior interest. So

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that now, more emphatically than under the circumstances of the other sub-title, the good of the child is the controlling force in directing its custody."

In Hewitt v. Long, 76 Ill. 399, 408, the court say: "In disposing of the custody of children, the primary object should be the good of children," and in Umlauf v. Umlauf, 128 Ill. 378, 380, this language occurs: "The controlling consideration, when both the husband and the wife are equally fit to have the care of the children, is the welfare of the children, and not the gratification of either parent."

This is not a case in which the parents are equally fit to have the care of the child; on the contrary, the great weight of the evidence manifestly is, that the appellant is, both by character and financial ability, fit to have the custody and care of the child, while the evidence as to appellee's personal fitness to have such custody is as heretofore stated.

We regard the decree as being manifestly against the clear weight of the evidence.

The evidence clearly shows that it is for the interest of the child to remain in the custody and care of appellant. No obstacle appears to appellee visiting the child as often as she may desire so to do.

The decree of July 17, 1906, appealed from, will be reversed.

*Reversed.*

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Wallace A. Lowell et al. v. E. B. Perry.

Gen. No. 18.297.

1. **ABSTRACT**—when affirmance upon insufficient, may be awarded. Where an abstract filed upon appeal is not in compliance with the rule, it is within the discretion of the Appellate Court to affirm the judgment, if the abstract contains sufficient of form and substance to disclose a cause of action.

2. **ABSTRACT**—when reversal will follow notwithstanding insufficiency of. Notwithstanding the abstract filed on appeal is insuf-

ficient, a reversal will follow if neither the abstract nor the record discloses a cause of action.

3. JUDGMENT—when reversal will be as to all parties. A judgment at law is a unit and if unsupported as to one party thereto it will be reversed as to all.

Action commenced before Justice of the peace. Appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in this court at the October term, 1906. Reversed and remanded. Opinion filed May 31, 1907.

M. L. THACKABERRY and J. H. HILL, for appellants.

G. B. CHAMBERLIN, for appellee; A. F. W. SIEBEL, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The abstract in this case is wholly unintelligible. It is partly an index to the record, and the balance consists of indiscriminate and disjointed excerpts from the testimony of witnesses which in no way disclose an understandable cause of action. Where an abstract is in some respects informal, but on its face contains sufficient of form and substance to disclose a cause of action, it is our duty to affirm the judgment appealed from. But this abstract, neither as to parties nor subject-matter, contains any substantive form or fact, from which, with all legitimate inferences flowing therefrom, the judgment can be maintained. In this dilemma we turn to the record itself to ascertain whether or not it contains sufficient *prima facie* proof in form and substance sustaining the judgment and justifying an affirmance. An examination of the record is equally mystifying.

The judgment appealed from is against Lowell and Buck, and is for \$250.

The suit originated before a Cook County justice of the peace, and was brought by appellee against the Chicago Fire Insurance Company, a corporation, S. W. Jacobs, W. A. Lowell, E. M. Chamberlain and R. N.

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Buck, and a judgment was rendered against all of them February 23, 1901, for \$200. From this judgment appellant, Wallace A. Lowell, perfected an appeal to the Superior Court. The other appellant entered his appearance, and the cause proceeded to trial against them before the Superior Court and a jury, the latter rendering a verdict against appellants in favor of appellee for \$250, upon which verdict, after the overruling of a motion for a new trial, judgment was entered.

It is impossible to discover from the evidence of the witnesses in this record the nature of appellee's claim. Appellee was not a witness. No one who testified had any personal acquaintance with appellee or knowledge of the matters, if any, upon which his claim rests. Chamberlin, the lawyer witness, received the claim from appellee through the mail. What that claim was the record fails to disclose. Chamberlin testifies to a conversation with Lowell and Jacobs, in which the witness said to them: "This is for work done by Mr. Perry up there in Minneapolis, and they said, yes, he has done the work and we owe him for that and we will pay him." (R. p. 29.) Again, this witness narrates the following conversation with Lowell and Jacobs (R. p. 29): "Mr. Perry claims here \$200 for work he has done for you, gentlemen, in the field in soliciting insurance for the months of September and October, and he—you owe him for this work \$200 and for cash expense, and they said, yes, that is correct and we will pay it." This evidence seems to us wholly insufficient to support a claim against appellants or against them and their co-defendants originally summoned before the justice of the peace, and wholly insufficient to create a joint liability against them or against appellants. If by any process of reasoning, or without it by violent assumption, this testimony can be held to establish a claim against anybody, it would seem to point to Lowell and Jacobs upon their alleged admissions and promise to pay, but how it can be held

to constitute evidence supporting a judgment against Lowell and Buck, we are unable to divine.

When we come to the evidence of Detective Woolridge, we find it equally unsatisfactory and wholly insufficient to uphold this judgment. Most of Woolridge's conversations were with Jacobs, who told him, he says, that Lowell was his partner, and that they claimed to be the Chicago Fire Insurance Company, and were engaged in promoting a lot of other fire insurance companies. Woolridge then details considerable hearsay evidence which, if true, might tend to prove that these fire insurance promoting schemes smacked of fraud. But whether this be true or not is entirely irrelevant here, for nowhere does it appear that appellee did any work or advanced any money for any of them at the request of appellants or anyone else. What insurance appellee solicited, if any, we are unable to say from the record. Woolridge further testifies that he had a lot of shares of stock of several insurance companies with Buck's name upon them as secretary. Yet Perry is nowhere and in no manner connected with either of them, so far as appears from the record. All the talks Woolridge had in the matters about which he testified were with Jacobs and Lowell.

Appellants, in order to rebut an inference which they deemed might arise from appellee's proof that "W. A. Lowell Company" was a fraudulent assumption by them of corporate functions which were without warrant of law, put in evidence its charter granted by the State of Illinois, by which it was authorized to do a general brokerage business, excluding real estate brokerage.

There is no evidence in this record establishing a claim against appellants. Neither is there any evidence that appellants were partners. The statements of Lowell and Jacobs, if true, furnish no proof from which an inference can be indulged that Lowell and Buck were partners or jointly liable to Perry on his

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claim, the exact nature of which is shrouded in a mystery not solved by the proofs. Whatever may be said of the liability of Lowell, the claim is against him and Buck on a contention that their liability is joint. The judgment is a unit, and if unsupported as to one must fail as to both.

The court instructed the jury on the theory that the debt in controversy was fraudulently contracted, but as no obligation was proven against appellants in favor of appellee, the question of fraud was a moot one and could have no effect upon the rights of the parties litigant.

The judgment of the Superior Court is erroneous, and it is therefore reversed and the cause remanded for a new trial.

*Reversed and remanded.*

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**David C. Campbell et al. v. Baxter J. Fierlein.**

Gen. No. 18.290.

1. **EMPLOYER AND EMPLOYEE—burden of showing sufficient grounds for discharge.** The burden of showing good and sufficient grounds for discharge rests upon the employer invoking such as a defense after the servant has proven the contract and its performance by him up to the time of his dismissal.

2. **FALSE REPRESENTATIONS—when instruction as to, improper.** An instruction upon the subject of false representations is improper where it omits the element of knowledge of falsity upon the part of the party alleged to have made them at the time when it was claimed that they were made.

3. **INSTRUCTION—propriety of refusing, containing an abstract proposition of law.** An instruction which contains an abstract proposition of law may be refused by the court without commission of error.

4. **INSTRUCTION—must not assume facts in dispute.** An instruction is properly refused which assumes the existence of facts in dispute.

**Assumpsit.** Appeal from the Superior Court of Cook county; the Hon. ROBERT W. WRIGHT, Judge, presiding. Heard in this court at the October term, 1906. Affirmed. Opinion filed May 31, 1907.

MOSES, ROSENTHAL & KENNEDY, for appellants.

ALAN C. McILVAINE, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The action here is assumpsit, and arises out of a contract of employment. The appellants were doing business under the style of "Campbell Investment Company," selling real estate. One of their firm activities was the selling of lots in a subdivision known as "Oak Lawn," situate about thirteen miles southwest of Chicago, sufficiently contiguous to the city to bring it within the designation of a Chicago suburb. The appellants employed appellee to work for them in their business of selling lots for six months at a weekly compensation of \$75. The contract of employment was contained in a letter written by appellee to the appellants, which they accepted. By its terms the service commenced April 18, 1904, and was to end on the same day in the month of October following. Appellants discharged appellee from their employ July 23, 1904. They insist the discharge was for cause: That appellee violated the conditions of his contract of employment. A trial before the court and jury resulted in a verdict for \$975, from which, on a motion for a new trial, appellee remitted the sum of \$115, and the court, after overruling appellants' motion for a new trial, rendered judgment for \$860 and costs of suit. Appellants preserved the usual exceptions to the adverse rulings of the court and bring the cause here for review upon due assignment of errors, and ask that the judgment of the Superior Court be reversed.

The amount of *remititur* is made up of \$43, an amount in excess of that unpaid upon the contract, which in all probability resulted from a miscalculation on the part of the jury, and of \$72 which appellee could have earned during the last ten days of the

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contract if he had availed of the employment offered him by the Columbian Three Color Company at \$50 per week.

Appellants urge in argument the following as reasons requiring a reversal of the judgment:

- 1st. Disobedience of orders and neglect of duty.
- 2d. Gambling and playing the races.
- 3d. Misrepresentations and false statements to customers.
- 4th. That the verdict is contrary to the weight of the evidence.
- 5th. Failure of appellee to make reasonable effort to find other employment.
- 6th. Improper and prejudicial conduct of the trial judge.

The questions here argued are mainly of fact, and their solution primarily the function and province of the jury. Upon the main facts essential to sustain in the first instance the claim of appellee there is no dispute. The conflict in the testimony is found in the evidence supporting the defense.

The contract of employment and all of its conditions are admitted. That appellee entered upon the service at the specified time, and was ready and willing to continue in such service during all the life of the contract is uncontradicted, so that unless the cause of discharge alleged by appellants is sustained by the proofs in the record, the judgment of the trial court must stand.

The results of appellee's efforts in the service of appellants during the time they permitted him to work in their interests seem, from the proofs, to have been fairly efficient and remunerative. The disobedience of orders relied upon as justifying appellee's discharge consists in failing to see one Schroeder, at Curtis, Wisconsin. Charles P. Campbell, one of the appellants, testifies that he told appellee, upon his return from the trip he was making when he failed to call on Schroeder, that he must not do that again.

This was in May. In July, 1904, appellee proceeded on a lot-selling trip through western Pennsylvania, and as far east as Washington, D. C. It is claimed that in disobedience of his orders, he did not call on either Fulton Bros., or Mrs. J. M. Greer, at Cannonsberg, Pennsylvania; J. R. Alexander, at Washington, D. C.; D. R. Doty, at New Kensington, and a Miss Berger, at Cleveland, and that he refused to take one J. H. Hubbard of Cox, Missouri, when in Chicago, out to see some lots.

Appellee makes what would seem to be satisfactory explanations of his conduct in all these cases. In the first place, appellee says C. P. Campbell told him that in visiting people on his journeyings he must use his discretion; that if the place was out of the way, inconvenient to get at, the expense, in his judgment, excessive, or the prospect of accomplishing a sale doubtful in his judgment, to omit visiting such persons and places.

Appellee says Schroeder was at a remote place, which was expensive to reach, requiring considerable time, and in the exercise of his best judgment he refrained from going to him. To say the least this, if an offense, was condoned. At least it may be said to be excusable.

Appellee says he was unable to find Miss Berger at Cleveland. This was an all-sufficient excuse in the absence of any evidence that she could have been readily found, or that appellee had information as to the place in Cleveland where he could find her. Doty was at an out of the way place. The door had been closed in appellee's face at Washington by one person he called upon, and deeming it inexpedient to attempt making sales to Alexander or others there, he left Washington without making any further effort. This action on appellee's part the jury may have concluded to have been in accord with his best judgment and in the interests of his employers. As to refusing to take Mr. Hubbard, of Cox, Missouri, out to see some lots, he

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explains that having other business of the firm in hand, it was arranged that John Campbell should go out with Hubbard, and positively denies that he refused to go out with Hubbard. Again, it is said appellee made false representations to the Rev. Mr. Prugh that nearly all of the lots in the "Oak Lawn" subdivision had been sold. There is no evidence that appellee made this statement wilfully with the knowledge that it was false. Nor does it appear that any prospective sale was lost by reason of it. C. P. Campbell did not appear to regard this lapse from exact truth with high displeasure, for he but mildly chided appellee, writing him that "While it may be a mark of good salesmanship to impress upon our customers the fact that nearly all the lots are sold, yet I think you have overstepped the truth a little."

Appellants insist that appellee was discharged for disobedience of orders. That some little time after appellee's return from the Eastern trip, C. P. Campbell called him into the office and notified him that he was discharged for failing to call upon the persons heretofore named, according to instructions. The insistence of appellants is supported solely by the testimony of appellant C. P. Campbell. Incidentally Campbell also claimed that appellee did not observe the regulation office hours, and that he "played the races." To the former of the latter two charges appellee says, in the first place, he never was informed in relation to any office hours, and in the second place, he was not an office man and had no office duties, but was an outside man, whose duty consisted in showing property and traveling in soliciting non-residents to purchase real estate which his employers had for sale. He admits "playing the races" and losing fifty dollars. This loss seems to have acted as a curative of a tendency to a bad habit. This occurred in the month of June, and his discharge dated from July 23rd. There is nothing in the proof justifying any inference that the reprehensible act of gambling at

all interfered with his efficiency as a salesman for appellants, or that appellants regarded it at the time as a cause for discharge.

The burden of showing good and sufficient grounds for discharge rests upon the employer invoking such as a defense after the servant has proven the contract and its performance by him up to the time of his dismissal. *Mercer v. Whall*, 48 E. C. L. 447; *School Directors v. Reddick*, 77 Ill. 629; *Morris v. Taliaferro*, 44 Ill. App. 359.

In this condition of the evidence it was for the jury to say whether the defense was sustained, or whether the causes assigned for discharge were mere pretenses, made in an effort to escape the binding obligation of an expensive contract. The jury may have believed the latter from all the evidence, the manner and appearance of the witness Campbell when testifying, his attitude of frankness or evasiveness, if such were apparent, especially having in mind the evidence of appellee, that Campbell was willing to enter into a new contract at the reduced salary of \$35 per week. The jury had the right to treat as verity the evidence of appellee and to disbelieve the denial of Campbell.

We think the testimony fairly establishes as a fact that appellee, after his discharge, made consistent, reasonable effort to procure other employment, and we are no more impressed with the weight of the testimony of the witness Hobbs on this point than were the jury. It is impotent in overcoming the detailed statement of persistent, intelligent effort by appellee to obtain employment. Hobbs, with all his wordy pretensions, neither procured other work for appellee nor offered him any position, temporary or permanent. Hobbs admits that his memory was hazy about the dates he talked with appellee, and the most that can be gathered from his testimony is that he offered some suggestions to appellee, which might, if followed, have resulted in his procuring another position.

We cannot yield our assent to the claim that re-

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marks made by the trial judge in his rulings during the trial were prejudicial to appellants' interests. The strictures upon the conduct of the trial judge found in appellants' brief are neither warranted nor justified by the record.

The conversation of Campbell with Dr. Prugh, sought through Campbell to be injected as evidence that appellee's misrepresentation to Dr. Prugh was prejudicial to the interests of appellants in a material way, was properly excluded upon appellee's objection. Such evidence would be clearly hearsay and inadmissible. Certainly this would be so without the assignment of any reasonable excuse for Dr. Prugh not appearing upon the trial or his evidence having been preserved by deposition. The authorities cited to maintain the contention that the ruling of the court in excluding this testimony was erroneous, are none of them in point on the facts found in this record.

We have examined all the instructions about which appellants complained, and are unable to discover any vice in them justifying a reversal.

The third refused instruction omitted the essential element of knowledge on the part of appellee that the representations made by him to Dr. Prugh were by him known to be false when made.

The sixth instruction refused was objectionable. It contains an abstract proposition of law, not calculated to enlighten the jury and not favored by the courts. It also erroneously assumed that appellee had been derelict in the duty he owed his employers. This was misleading. Whether or not appellee had so conducted himself as to warrant appellants in discharging him, was a burden the law cast upon appellants to maintain, and it was for the jury to decide, as a question of fact, whether such defense was sustained by the proof.

We do not think the judgment is against the weight of the evidence, but on the contrary that it is amply supported by it. On the whole evidence appellee is entitled to recover.

We find no harmful error in this record warranting a disturbance of the judgment rendered by the Superior Court, and its judgment is therefore affirmed.

*Affirmed.*

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**The M. M. Mitchell Company v. Minnette M. Mitchell.**

Gen. No. 18,294.

1. **BILL OF COMPLAINT**—*what not sufficient averment of embezzlement.* A bill of complaint seeking to enforce a negative covenant contained in a contract of service which alleges that the resignation of the defendant was requested "on account of embezzlement by her," does not aver embezzlement as excusing or justifying the request for resignation and as precluding the defense of first breach by the complainant.

2. **RESTRAINT OF TRADE**—*what essential to enforcement of covenants in.* Covenants in restraint of trade are not favored, and when sought to be enforced must not only be reasonable, but within the strict letter of the contract in virtue of which such right is sought to be compelled by the aid of a court of chancery.

Bill for injunction. Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1906. Affirmed. Opinion filed May 31, 1907.

JONES, ADDINGTON & AMES, for appellant; W. CLYDE JONES and KEENE H. ADDINGTON, of counsel.

JOHN R. PHILP and W. S. JOHNSON, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal from an order dissolving a temporary injunction and dismissing the bill for want of equity.

Appellant is a corporation engaged in loaning money to wage earners at exorbitant and usurious rates of interest, and on the 12th of May, 1905, made an agreement of employment with appellee for her

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personal service in its business at a wage of \$25 per week, service to commence on the first day of September, 1905, and to end on the last day of August, 1906. At the termination of the contract by efflux of time appellee was to have a bonus of \$200.

The clause of the contract under which relief is prayed reads:

"That first party shall have the right to use the name of second party as M. M. Mitchell, Mrs. M. M. Mitchell, or in some other form combining the second party's name in whole or in part in the conduct of said business, and that the right to use the said name shall continue for the full term of one year after the 31st day of August, 1906, and that second party will not, except in connection with first party, engage in the loan business in the city of Chicago, at any time prior to the 31st day of August, 1907, either in her own name or in the name or employ of any other person."

The bill was filed May 18, 1906, and sought to enjoin appellee from engaging in the loan business in the city of Chicago at any time prior to August 31, 1907, either in her own name or in the name or employ of any other person.

The bill avers *inter alia* that on March 6, 1906, appellant demanded the resignation of appellee on account of embezzlement by her, and that, disregarding the contract, she "has engaged and is now engaging in the loan business in the city of Chicago."

We are unable to interpret this language, in the absence of any further averment, or hold it as susceptible to any other interpretation than that appellant voluntarily by the request of appellee's resignation, broke the contract and ended it. The averment that appellee's resignation was requested "on account of embezzlement by her" falls far short of a charge of embezzlement against her and amounts to nothing more than an excuse for terminating the contract. We cannot assume appellee to have been guilty of the crime of embezzlement in the absence of allegations

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of facts which if true and susceptible of proof, would be sufficient to fasten a charge of embezzlement upon her. Appellant cannot justify a breach of the contract in the absence of conditions which in law would warrant such action. The contract being broken by appellant without right operated to relieve appellee from the further performance of any covenant restricting her from engaging in business of the same nature as that for which appellant was incorporated. Covenants in restraint of trade are not favored, and when sought to be enforced must not only be reasonable, but within the strict letter of the contract in virtue of which such right is sought to be compelled by the aid of a court of conscience, which in the case at bar appellant invoked.

The bill, unsupported by any averment of fact, does not entitle appellant to the relief prayed, and in this condition and in the absence of any application to amend, it was the duty of the chancellor, upon motion made by appellee, to dismiss the same for want of equity. What is claimed to constitute a charge of embezzlement is but the conclusion of the pleader, to support which no fact is charged. This is wholly insufficient. *City of Chicago v. Farson*, 118 Ill. App. 291.

There being no averment of fact entitling appellant to an injunction, it was, to say the least, improvident to issue it without notice to appellee. *Commerce Vault Co. v. Hurd*, 73 Ill. App. 107.

The decree of the Circuit Court dissolving the injunction and dismissing the bill for want of equity was right, and it is affirmed.

*Affirmed.*

**J. M. Coats et al. v. Chicago, Rock Island & Pacific Rail-way Company.**

Gen. No. 18,248.

1. COMMON CARRIER—*effect of statute prohibiting limiting of common law liability.* The statute of this state prohibiting a carrier from limiting its liability is but declaratory of the common law.

2. COMMON CARRIER—*common law obligation to transport.* By the common law a common carrier who receives goods for transport marked for a particular place, is *prima facie* obligated to carry and deliver such goods to the place for which they are marked, even though such place be beyond the terminus of its own line.

3. COMMON CARRIER—*how common law obligation to transport may be limited.* The common law obligation of a carrier to transport can only be limited by an express agreement, and the burden to prove such express agreement rests upon the carrier.

4. COMMON CARRIER—*summary of law of Illinois in regard to general and restricted obligations of carrier to transport.* It is the law in this state, first, that the liability of a common carrier is that imposed by the common law; second, that a restriction in a bill of lading to the contrary is insufficient of itself to relieve the carrier from the liability created by the common law; third, a limitation of liability, to be effective, must rest in an express contract; fourth, that the *onus* of proving an exemption from the liability imposed by the common law is on the carrier; and, fifth, the determination of the question of fact as to whether or not an express contract limiting the carrier's liability exists, is for the jury.

5. BILL OF LADING—*what tends to show non-assent to limitation of liability contained in.* The non-delivery of a bill of lading until several days after receipt by the carrier of the goods shipped, tends to prove the non-assent by the shipper to the restrictive provisions contained in such bill of lading.

6. SISTER STATE—*when statute of, need not be pleaded.* Held, in this case, that it was not necessary to plead the statute of a sister state in order to avail thereof as a defense.

7. SISTER STATE—*presumption as to law prevailing in.* In the absence of proof it will be presumed that the common law exists in a sister state or else that its laws are similar to the laws of this state.

8. JUDICIAL NOTICE—*of what not taken.* Judicial notice will not be taken of the statutes of a sister state; to be availed of they must be proven as other facts.

9. COMITY—*when law of sister state will not be enforced in Illinois.* Notwithstanding a contract may have been made in another

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state which is affected by a statute, yet the courts of this state will not follow a decision construing such statute where such decision is unsound and places a construction upon such statute, other and different than that which has been given to a like statute existing in this state.

10. NEW CAUSE OF ACTION—*when amendment does not set up.* A new cause of action is not set up by alleging in the amendment that the contract in virtue of which the right of action was grounded, was in writing,—the original declaration being silent as to whether the contract was oral or written.

11. STATUTE OF LIMITATIONS—*when ten-year provision applies.* The ten and not the five-year limitation applies to an action instituted against a carrier for failure to observe its common law obligation to transport, where a bill of lading was issued upon or soon after the receipt of the property sought to be transported, and this notwithstanding a portion of such bill of lading is held to be void.

Action on the case. Appeal from the Superior Court of Cook county; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in this court at the October term, 1906. Reversed and remanded. Opinion filed May 31, 1907. Rehearing denied and opinion modified and refiled June 20, 1907.

E. F. THOMPSON, for appellants.

M. L. BELL, for appellee; BENJAMIN S. CABLE, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal from a directed verdict in favor of the defendant, appellee.

The question here involved is the liability of the defendant railway company under certain bills of lading to carry certain cars of potatoes from points in the State of Iowa upon the line of the road of the defendant to the city of Philadelphia on the line of a connecting railroad. Plaintiffs were consignors of the potatoes, and Pancoast & Griffith, dealers in potatoes at Second and Masters streets, Philadelphia, were consignees. The city of Chicago was the point on the line of defendant where the cars were to be diverted on their journey east to another road there connecting

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with the defendant road. The usual time for completion of the journey from the point of shipment to destination is about 5 or 6 days. But either from delays in transit or by reason of detention in the yards of the railroad at Philadelphia, the potatoes were not delivered until three or four weeks from the date of shipment, at which time, being perishable, the potatoes were unfit for human consumption.

As the questions here presented for review are of law, and not of fact, and as the conclusions to which we have arrived necessitate a remanding of the cause for a new trial, we shall refrain from any discussion, in this opinion, of the facts, leaving such questions for the determination of the trial court within the principles of law here announced.

The bills of lading issued by the defendant to the plaintiffs restricted in form the liability of the defendant. They recite that the potatoes were received "to be transported over the line of this road to Chicago station, or to such company or carriers (if the same are to be forwarded beyond said station) whose line may be considered a part of the route to the place of destination; *it being distinctly understood that the responsibility of this company as a common carrier shall cease at the said station.*"

There is evidence tending to establish as a fact that the bills of lading were not delivered to the consignors for several days after the shipments were made. If this is the fact, it is material only for the purpose of ascertaining whether or not plaintiffs assented to the attempted limitation of the common law liability of defendant as a common carrier.

The common law liability of the carrier is safely to carry and deliver the goods received for transportation to the place of consignment, regardless of the fact that such place is beyond the terminus of its own road. This statement is not and cannot be controverted. The statute of this state prohibiting the carrier from limiting its common law liability in this regard is but

declaratory of the common law. It is couched in the following terms—sec. 102, chap. 114, R. S. Starr & Curtis, ed. 1896: “That whenever any property is received by any railroad corporation to be transported from one place to another, within or without this state, it shall not be lawful for such corporation to limit its common law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for the safe delivery of such property.”

The rule of the common law is well stated in *Fortier v. Pennsylvania Company*, 18 Ill. App. 260, in the following language: “By the rules of the common law, as expounded by the highest judicial tribunal of this state, the receipt for transportation by a railroad company of goods marked for a particular place, is to be construed *prima facie* as a contract to carry and deliver the same at the place for which they are marked, though beyond the terminus of its own line.”

This duty cannot be varied or the obligation imposed by the common law limited short of an express agreement. The fact of such restrictive clause appearing in the receipt is not *ipso facto* evidence of assent by the consignor. That the receipt was accepted with the knowledge and understanding of the restrictive clause is a matter of proof and must be substantiated by evidence establishing the fact. The burden of such proof rests upon the carrier, as an affirmative, substantive fact. The ultimate fact is a question for the jury to find. *Chicago & N. W. Ry. Co. v. Simon*, 160 Ill. 648; *Wabash R. R. v. Thomas*, 222 Ill. 337.

As said in *Illinois Central v. Frankenberg*, 54 Ill. 96: “By the law of common carriers their liability was fixed on the receipt of the goods to be carried. They are insurers of the goods, and if not delivered at their place of destination they are accountable for them, and when called upon to account for them the

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*onus* of proof is upon them, and they are chargeable with their value, unless the loss was caused by a force superior to human agency, which no foresight could have guarded against, or by the public enemy."

Again it is said in *M. D. Trans. Co. v. Theilbar*, 86 Ill. 71: "The doctrine is too well settled in this court to now admit of discussion, that a clause in a receipt or bill of lading exempting the carrier from a common law liability, is not binding on the shipper unless it appears that the shipper knew of and assented to the exemption, and that this is a question of fact on the trial of the case," citing cases.

There is no evidence in the record that plaintiffs knew or assented to the limitation of the liability in the bills of lading, and the evidence tending to prove that delivery of the bills of lading was not made to the shippers until several days subsequent to the receipt of the potatoes, strongly tends to sustain the contention of plaintiffs that no such consent was yielded.

This court, in the case of *Pennsylvania R. R. v. The John Anda Company*, 131 Ill. App. 426, said: "The limitation of appellant's liability contained in the bill of lading does not, in the absence of proof that such limitation was brought to the attention of the shipper and assented to by him, operate to relieve appellant of its common law liability to carry and deliver the consigned property to the destination in the bill of lading. Such liability can not be limited by notice. Nor can a carrier limit its common law liability safely to deliver the consigned property at the designated place of destination by any limitation expressed in its receipt for the property. The right to make any such limitation in a receipt is prohibited by sec. 102, chap. 114, and sec. 1, chap. 27, R. S. Starr & Curtis's ed. It has, however, been held in this state that the carrier's liability by force of the common law may be limited by an express contract. *Chicago & Northwestern Ry. v. Chapman*, 133 Ill. 96; *Field v. C., R. I. & P.*, 71 Ill. 458."

It is the law in this state: First, that the liability of a common carrier is that imposed by the common law; second, that a restriction in a bill of lading to the contrary is insufficient of itself to relieve the carrier from the liability created by the common law; third, a limitation of liability, to be effective, must rest in an express contract; fourth, that the *onus* of proving an exemption from the liability imposed by the common law is on the carrier; and fifth, the determination of the question of fact as to whether or not an express contract limiting the carrier's liability exists, is for the jury.

But it is urged by defendant that the bills of lading were made in the State of Iowa, and that as contracts made in that state, they must be interpreted in this forum in accord with the law of the state where the contract was made. The Iowa statute is similar to our own, and in no sense narrows the carrier's common law liability. It is section 2074 of the Iowa Code, and reads: "No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into."

This statute was not pleaded as a defense, neither do we think it was necessary to so plead it. There being no material distinction between the statutes of the two states, the whole question resolved itself into one of construction. While it was not necessary to plead the Iowa statute, yet if the interpretation of the statute by the Iowa courts was sought to be invoked as a rule of construction to be applied in the *lex forum*, it was necessary to prove as a fact the law of the foreign jurisdiction by introducing as evidence the decisions of its tribunals on that subject. The learned trial judge proceeded upon the erroneous assumption that the case of *Mulligan v. Ill. Central R. R. Co.*, 36 Ia. 181, was before him as evidence. The place for

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such evidence is the bill of exceptions, which we have scanned in vain in an effort to find it. It is not enough that the learned trial judge should have had the case before him in rendering his decision. To make it evidence of a fact, which the laws of foreign jurisdictions are, it must be preserved in the bill of exceptions. While the court in Christiansen v. Graver Tank Works, 223 Ill. 142, held that in certain cases neither statutes nor the reported decisions of other states need be pleaded, but might be given in evidence under the general issue, yet such ruling rested upon the ground that such laws and decisions should be put in evidence in the same manner and with like effect as any other question of fact. We are not permitted to take judicial notice of the laws of a foreign state when such laws are necessary to be proven as facts, unless they appear with the other facts in the case in the bill of exceptions found in the record. The rule is, as stated in Crouch v. Hall, 15 Ill. 263, "As a general principle courts will not take judicial notice of the laws of another country, but they must be proved as facts." Dearlove v. Edwards, 166 Ill. 619.

The citation from Hartmann v. Louisville, etc., 39 Mo. App. 97, is apt and forcible in its application here: "The law of a foreign state is to be proved as a fact, and whether it has been proved must be determined by the evidence which has been received in the trial court for that purpose; otherwise a case depending upon foreign law might be determined according to another conception of the law in the Appellate Court by reason of the general learning of the judges of the Appellate Court in that law. This would be equivalent to the introduction of new evidence in the Appellate Court upon the question in issue, which is contrary to the fundamental rules of Appellate procedure."

It logically follows that the court of review, in its interpretation of the foreign law, must be restricted to those decisions appearing in the record as evidence

heard in the trial court, for to look further would be tantamount to receiving additional evidence and violate the rule governing courts of review restricting their research as to questions of fact to those shown by the evidence in the record.

It is therefore patent that the interpretation of section 2074 of the Iowa Code by the courts of Iowa, is not before us. In the absence of proof, we may assume that either the common law obtains in Iowa, or else that its laws are similar to the laws of this state. *Juilliard v. May*, 130 Ill. 87.

For the purpose of illustrating the point, we will, for the time being, assume that the Mulligan case, *supra*, is in the record. That decision is evidently contrary to the interpretation of our Supreme Court upon a like statute. We have grave doubts as to its soundness. In the light of our own decisions and those of other courts, as to the common law liability of carriers, this statute of Iowa, enacted for the sole purpose of setting at rest and withdrawing from the realm of doubt and making certain that which might seem otherwise, is by the Mulligan decision nullified. The evident purpose of this statute has, by judicial decision, been rendered abortive. If the construction of it under the Mulligan case is correct, then in the face of rendering plain the legislative intent not to restrict the common law liability of carriers, it has, by judicial construction served the purpose of suspending the unrestricted liability to carry and deliver goods consigned for transportation safely, imposed by the common law. Are the courts of this forum bound to follow a decision of this character, which appeals to them as being unsound?

We are not without authority of the highest character foreshadowing our duty in such a situation. The law on this subject has been lucidly stated by the Supreme Court of Iowa.

In *Dorr Cattle Co. v. National Bank*, 127 Ia. 153, the court say: "In the instant case no right created

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by statute was asserted to have been violated; the rules of the common law alone were invoked. These obtained with equal force in Illinois, Iowa, and other states. They have been adopted, in so far as applicable, from the same common source, and must be necessarily assumed to be the same everywhere. Mistakes in interpretation may be made, but the principles of justice go on forever. Every court will determine for itself what these may be, as found in the common law.” Franklin v. Twogood, 25 Ia. 520; National Bank of Iowa v. Green, 33 Ia. 140; Johnson v. Railway, 91 Ia. 248.

The court say in Hoyt v. Thompson, 19 N. Y. 207: “The statutes and laws of a country have no intrinsic extra territorial force. They bind only its own citizens, and citizens of other countries while within its jurisdictional limits, and they bind directly only property within those limits. They do not bind property out of its territory or persons not resident therein. But no nation, on any recognized principle of comity is, orally or otherwise, bound to enforce foreign laws (statutory) prejudicial to its own rights or the rights of its citizens.”

And in Roads v. Webb, 91 Me. 406, that “Where the general principles of commercial law are to be applied to a contract, the court of the forum will apply those principles according to its judgment, notwithstanding that it may have been held differently where the contract was made.”

And in St. Nicholas Bank v. State Bank, 128 N. Y. 26, “That while the statute laws of another state will be followed by the court of the forum, that it will follow its own precedents in the expounding of the general common law applicable to commercial transactions.”

The case of Faulkner v. Hart, 82 N. Y. 413, is very instructive on the question of the limitation environing comity between the states in following the laws of each other. Among other things the court say: “As

we have seen, the United States Supreme Court have refused to sustain the decision of the state court when violating a great principle; and the rule is a sound one which upholds the position that the decisions of the state court should not be followed to such an extent as to make a sacrifice of truth, justice and law. It is upon a principle of comity, that one state recognizes and permits the operation of the laws of another state within its own jurisdiction, where such law is not contrary to its own rules of policy, or to abstract right, or the promotion of justice and morality; but this principle should never be carried to the extent of holding that a suitor in its courts is debarred from the maintenance of his just rights according to its well-established decisions and laws, and the general principles of the common law which it has fully recognized and which are almost universally regarded and accepted, in reference to the question presented, wherever the common law prevails. No rule of comity demands any such sacrifice in the business intercourse between the people of the different states, and great injustice might follow by yielding to such a principle, and in sustaining a rule of law which was wrong in itself, hostile to the policy and law of the state where the contract was made, and adverse to the general current of authority elsewhere."

The Iowa statute being similar to our own statute on the same subject, and both being declaratory of the common law, will be construed, interpreted and applied in accordance with the law of this forum wherever the decisions of the Iowa courts are in conflict with or contrary to the law as expounded by the courts of this state.

Appellees did not introduce a new cause of action by the amendment which stated that the contract, in virtue of which the right of action was grounded, was in writing. The cause of action was the identical one averred in the original declaration. The amendment was in avoidance of the plea of the five year limita-

tion statute. The same result—an avoidance of that plea—could have been attained by a replication in confession and avoidance. The rights and duties of the parties to each other rested in writing according to its legal import and interpretation, and the fact that by legal construction the clause of the writing attempting to limit the liability of appellee imposed by the common law was ineffectual for that purpose in no way made void the writing or operated to remove it as the foundation upon which the rights of appellants rest. The proof fails to sustain the plea of the ten year limitation statute, and it follows that appellants failed to sustain the affirmative defense interposed by that plea.

For the errors indicated the judgment of the Superior Court is reversed and the cause remanded for a new trial in accordance with the law as here declared.

*Reversed and remanded.*

CASES  
DETERMINED IN THE  
THIRD DISTRICT  
OF THE  
APPELLATE COURTS OF ILLINOIS  
DURING THE YEAR 1907.

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**Chicago, Burlington & Quincy Railway Company et al.  
v. Anton J. DeFreitas.**

1. MEASURE OF DAMAGES—*when instruction as to, improper in action for injury to real property resulting from construction and operation of railroad.* In an action for damages to real property resulting from the construction and operation of a railroad, an instruction upon the measure of damages which employs the phrase “from inconvenience from trains,” as an element depreciating the value of the property in question, is too vague and indefinite.

2. MEASURE OF DAMAGES—*what is not proper element of, in action for injury to real property resulting from construction and operation of railroad.* In an action to recover damages for injury to real property resulting from the construction and operation of a railroad, it is only those special damages which have been suffered which are different in kind from those sustained by the general public which may be made the basis of a recovery.

Action on the case. Appeal from the Circuit Court of Morgan county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed upon *remittitur*. Opinion filed June 1, 1907.

KIRBY & WILSON, for appellants.

JOHN A. BELLATTI, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee brought his action on the case against ap-  
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pellants to recover damages to his residence property, known as lots No. 162 and 163 in the Car Shops addition to the city of Jacksonville, alleged to have been caused by the construction and operation of a railroad through said city in the vicinity of said property. Upon a trial in the Circuit Court of Morgan county, there was a verdict and judgment against appellants for \$350.

The dwelling house and outhouse of appellee are located on lot No. 162, and upon both lots are planted fruit trees and grape vines. The dwelling house fronts to the west on Allen street. The railroad track of the Chicago, Peoria & St. Louis Ry. Co., running north and south, is located about 300 feet east and in the rear of appellee's residence, and appellants' railroad track is located between the first named track and appellee's residence at a distance of 187 feet from the latter, and 75 or 80 feet from the east line of appellee's lots. At a point about 400 feet southeast of appellee's residence appellants' track forms a junction with the track of the Chicago, Peoria & St. Louis Ry. Co.

Appellee testified that gas, smoke and cinders from locomotives operating on appellants' track, were cast upon his dwelling house and premises; that trains passing upon the track jarred his premises and awakened him; that he was annoyed by the noise of the passing trains; that trains going southeasterly on appellants' track frequently stopped in the rear of his premises and signalled by repeated whistling for the opening of the switch connecting with the track of the Chicago, Peoria & St. Louis Ry. Co.

There is no evidence in the record tending to show that the jarring or vibration perceived by appellee, which accompanied the passing of trains, in any manner injured the dwelling house, outhouses, fruit trees or vines belonging to appellee, or that the construction and operation of the railroad interfered in any degree with appellee's right of egress from or ingress to his property.

The fourth instruction given by the court at the request of appellee, is as follows:

"The court instructs the jury that if you believe from the evidence that in consequence of the construction and operation of the defendants' railroad, the plaintiff's property is depreciated in value from exposure to fire, from inconvenience from trains, from smoke and cinders from locomotives, from noise and jar of trains, then such matters are proper to be taken into consideration by you in determining to what extent the plaintiff's property is damaged. The real question is to what amount, if any, is the plaintiff's property diminished in value by the construction and operation of said railroad."

What is meant by the phrase in the instruction, "from inconvenience from trains," as an element depreciating the value of the property? In our judgment it is too vague, indefinite and uncertain to enable a jury properly to measure the damages recoverable. It is sufficiently broad in its scope to include certain elements of personal discomfort and annoyance for which, in such cases, no damages are recoverable at law. In Illinois Central R. R. Co. v. Trustees of Schools, 212 Ill. 406, it was said: "The provision of the constitution that private property shall not be damaged for public use was not intended to reach every possible injury that may be occasioned by a public improvement." After quoting from Rigney v. City of Chicago, 102 Ill. 64, as to what constitutes a special damage and injury for which a recovery may be had, the opinion proceeds as follows: "The important question is to determine what is a special damage and injury, within the meaning of that and other cases. One thing that is clear is, that the damage must be a damage to property and not mere personal inconvenience or injury, such as a damage to trade or business. (Hohmann v. City of Chicago, 140 Ill. 226.) If a right of action is merely personal without reference to property, the constitution does not guarantee compensation. If the injury amounts only to an inconvenience

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C., B. & Q. Ry. Co. v. De Freitas.

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or discomfort to the occupants of property, which would authorize a personal action but not affecting the value of the property, it is not within the provision. The injury must also be actual, susceptible of proof and capable of being approximately measured. It must not be merely speculative, remote, prospective or contingent. The special damage must be different in kind from that sustained by the general public, although it does not cease to be special because a considerable number are affected in the same way." To the like effect is Aldrich v. Met. West Side El. Ry. Co., 195 Ill. 546.

As there is no proof in the record of any direct physical disturbance of a right which appellee enjoys in connection with his property resulting in special damage thereto, by reason of the vibration or jar from passing trains, the instruction is erroneous in that it authorizes the jury to consider such vibration or jar as a proper element in estimating the damages to the property. It was the consideration by the jury of a like improper element of damage, among others, in Illinois Central v. Trustees of Schools, *supra*, that moved the court to reverse the judgment.

The amount of the verdict in this case can only be accounted for by the fact that the jury did, as authorized by said instruction, consider improper elements of damage. If appellee will, within 20 days after the filing of this opinion, remit \$100 from the amount of the judgment, it will be affirmed for \$250, otherwise it will be reversed and the cause remanded.

*Affirmed upon remittitur. Remittitur filed and judgment affirmed.*

**Chicago, Burlington & Quincy Railway Company et al.  
v. S. F. Fenstermaker.**

This case is controlled by the decision in *C., B. & Q. Ry. Co. et al. v. DeFreitas*, *ante*, p. 228.

Action on the case. Appeal from the Circuit Court of Morgan county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed upon remittitur. Opinion filed June 1, 1907.

KIRBY & WILSON, for appellants.

JOHN A. BELLATTI, for appellee.

PER CURIAM. Appellee is the owner of lots No. 135 and 136 in the Car Shops addition to the city of Jacksonville, improved with a dwelling house, outhouses, fruit trees and grape vines. He recovered a verdict and judgment against appellants for \$200, for damages resulting to his property by reason of the construction and operation of a railroad. The record in this case is substantially identical with the record in the case in which Anton J. DeFreitas recovered a judgment against the same defendants for \$350, for damages to real estate similarly situated with reference to the same railroad, in which case an opinion is this day filed in this court. (*Ante*, p. 228.)

The first instruction given at the request of appellee in the case at bar is the same instruction which is criticized in the opinion in the DeFreitas case, and for the reasons stated in that opinion a like conclusion is arrived at in this case.

If appellee will, within 20 days, remit \$50 from the amount of his judgment it will be affirmed for \$150, otherwise the judgment will be reversed and the cause remanded.

*Affirmed upon remittitur. Remittitur filed and judgment affirmed.*

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C., B. & Q. Ry. Co. v. Steinkuehler.

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**Chicago, Burlington & Quincy Railway Company et al.  
v. Fred H. Steinkuehler.**

This case is controlled by the decision in C., B. & Q. Ry. Co. et al. v. DeFreitas, *ante*, p. 228.

Action on the case. Appeal from the Circuit Court of Morgan county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed upon *remittitur*. Opinion filed June 1, 1907.

KIRBY & WILSON, for appellants.

JOHN A. BELLATTI, for appellee.

**PER CURIAM.** Appellee as the owner of lots No. 158 and 159 in the Car Shops addition to the city of Jacksonville recovered a verdict and judgment against appellants for \$400 for damages alleged to have resulted to said property by reason of the construction and operation of a railroad.

The questions presented by the record in this case are the same as those involved in the case of DeFreitas against the same defendants, and the opinion in that case this day filed in this court controls the disposition of this case. (*Ante*, p. 228.)

If appellee will, within 20 days, remit \$100 from the amount of his judgment, it will be affirmed for \$300, otherwise the judgment will be reversed and the cause remanded.

**Affirmed upon remittitur. Remittitur filed and judgment affirmed.**

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**Chicago, Burlington & Quincy Railway Company et al.  
v. George Souza.**

This case is controlled by the decision in C., B. & Q. Ry. Co. et al. v. DeFreitas, *ante*, p. 228.

Action on the case. Appeal from the Circuit Court of Morgan

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county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed upon *remittitur*, Opinion filed June 1, 1907.

KIRBY & WILSON, for appellants.

JOHN A. BELLATTI, for appellee.

**PER CURIAM.** Appellee as the owner of lots No. 156 and 157 in the Car Shops addition to the city of Jacksonville recovered a verdict and judgment against appellants for \$400 for damages alleged to have resulted to said property by reason of the construction and operation of a railroad.

The questions presented by the record in this case are the same as those involved in the case of DeFreitas against the same defendant and, the opinion in that case this day filed in this court, controls the disposition of this case. (*Ante*, p. 228.)

If appellee will, within 20 days, remit \$100 from the amount of his judgment, it will be affirmed for \$300, otherwise the judgment will be reversed and the cause remanded.

*Affirmed upon remittitur. Remittitur filed and judgment affirmed.*

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#### Chicago-Virden Coal Company v. James Bradley, Administrator.

1. **AMENDMENTS—how statute authorising, construed.** The statute authorizing amendments in any process or pleading is to be liberally construed and an amendment is permissible that tends to the furtherance of justice.

2. **INJURIES ACT—action under, not identical with action under Mines and Miners Act.** The cause of action accruing to an administrator by virtue of the Injuries Act to recover damages for the benefit of the widow and next of kin of his intestate, is separate, distinct and different from the cause of action accruing by virtue of the Mines and Miners Act to the widow, lineal heirs, adopted

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children, or other person or persons dependent for support upon the deceased, for the recovery of damages.

3. STATUTE OF LIMITATIONS—*when amendment barred by.* Where a cause of action predicated upon the Mines and Miners Act is amended by the substitution of a cause of action predicated upon the Injuries Act after such latter cause of action, if made the basis of an independent action, would be barred by the Statute of Limitations, such an amendment is barred.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Sangamon county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the May term, 1906. Reversed and remanded with directions. Opinion filed January 8, 1907. Opinion modified and judgment here, May 23, 1907.

CONKLING & IRWIN, for appellant.

C. F. MORTIMER, PERRY & MOBGAN and McQUIGG & DOWELL, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

On August 22, 1902, appellee, as administrator of the estate of Edward Bradley, deceased, commenced his action on the case to recover damages for the death of his intestate, and filed his declaration consisting of two counts, the first count charging common law negligence and the second count charging wilful violation by appellant of a certain provision of the Mines and Miners Act. A demurrer interposed by appellant to each count of the declaration was sustained by the court, and appellee took leave to amend the first count and to file an additional count. On January 21, 1904, appellee filed his amended first count and an additional count, and to the amended declaration appellant filed its plea of the general issue. February 29, 1904, on motion of appellee, he was dismissed as plaintiff in the action, and Edward Bradley and Ann Bradley, the father and mother of the deceased, were, upon their motion, substituted as parties plaint-

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iff, and leave was granted to amend the *praecipe* and summons and to file an amended declaration.

April 4, 1904, the *praecipe* and summons were amended, and an amended declaration was filed consisting of three counts, alleging the wilful violation by appellant of a provision of the Mines and Miners Act.

Thereafter, appellant moved to strike the amended *praecipe*, summons and declaration from the files, which motion was overruled by the court, and appellant, thereupon, interposed a demurrer to the amended declaration, which was sustained, and leave given to amend the declaration. January 9, 1905, on motion of the then plaintiffs, Edward and Ann Bradley, they were dismissed as plaintiffs in the action, and appellee, James Bradley, administrator of the estate of Edward Bradley, deceased, was, upon his motion, substituted as party plaintiff, and leave was given to amend the *praecipe*, summons and declaration, and to file additional counts. Thereafter, the *praecipe*, summons and declaration were amended and additional counts filed, the several counts of the declaration as amended and the additional counts then filed, all charging common law negligence. Upon the trial all the counts of the amended declaration except the first, and all of the additional counts except the third, were withdrawn by appellee. These counts charged substantially the same common law negligence alleged in the first count of the original declaration and in the several counts of the first amended declaration.

January 24, 1905, appellant appeared specially and moved the court to strike from the files the amendments to the *praecipe*, summons and declaration made under leave granted January 9, 1905, and also the additional counts thereafter filed, which motion was overruled by the court. Thereafter, appellant filed its plea of the general issue and the fur-

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ther plea of the Statute of Limitations. Appellee filed his *similiter* to the plea of the general issue, and interposed a demurrer to the plea of the Statute of Limitations, which demurrer was sustained. Upon the trial there was a verdict against appellant for \$3,500, and judgment on the verdict.

Numerous questions are raised upon the record, a consideration and determination of some of which, involving the propriety of the ruling of the trial court in the admission of certain evidence, would demand a reversal of the judgment and a remandment of the cause for another trial, but in the view we are constrained to take of the case, a consideration of the questions other than those involving the propriety of the action of the court in sustaining a demurrer to appellant's plea of the Statute of Limitations, becomes unimportant.

The statute authorizing amendments in any process or pleading is to be liberally construed, and any amendment is permissible that tends to the furtherance of justice. (*Teutonia Life Ins. Co. v. Mueller*, 77 Ill. 22; *United States Ins. Co. v. Ludwig*, 108 Ill. 514.) In *Kanawha Dispatch v. Fish*, 219 Ill. 236, it was held that under our liberal statute of amendments there may be an entire change of plaintiffs where necessary. And this rule, as we understand it, is not limited in its application by the fact that the proposed amendment introduces a new or different cause of action. Where, however, a new or different cause of action barred by the Statute of Limitations is introduced by the amendment, the Statute of Limitations may be successfully pleaded in bar. In such case, the beginning of the original action does not interrupt the running of the statute as to the cause of action introduced by the amendment (*Fish v. Farwell*, 160 Ill. 236), but the introduction of a new cause of action by amendment is to be regarded as the commencement of a new suit when the amend-

ment is filed, and the Statute of Limitations may be pleaded in bar. Chicago City Ry. Co. v. McMeen, 206 Ill. 108; Heffron v. Rochester Ins. Co., 220 Ill. 514.

The cause of action accruing to an administrator by virtue of the Injuries Act to recover damages for the benefit of the widow and next of kin of his intestate, is separate, distinct and different from the cause of action accruing by virtue of the Mines and Miners Act to the widow, lineal heirs, adopted children, or other person or persons dependent for support upon the deceased, for the recovery of damages.

When appellee, on February 29, 1904, dismissed his suit against appellant, and Edward Bradley and Ann Bradley, the father and mother of the deceased, were substituted as parties plaintiff, and the process and declaration were so amended as to constitute a different cause of action against appellant, the suit originally commenced by appellee as administrator terminated, and the case then stood as if no legal proceedings had been taken by appellee. The count of the original declaration, which alleged common law negligence, went out of the case as completely as if no declaration containing such count had ever been filed. Such dismissal of his suit by appellee as administrator did not operate as a bar to the commencement of a subsequent suit by him upon the same cause of action, neither was it a bar to a subsequent amendment whereby he might be substituted as party plaintiff in a cause of action accruing to him as administrator, but in order to avoid the bar of the Statute of Limitations such subsequent suit must have been commenced, or such amendment made, before the Statute of Limitations had run.

In the case at bar the deceased was killed July 16, 1902, and by virtue of the amendment to the Injuries Act which went into effect July 1, 1903, the cause of

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action for the recovery of damages for his death, accruing to appellee as administrator, was barred July 16, 1903. The substitution of appellee as plaintiff and the amendment of the process and declaration whereby the cause of action accruing by virtue of the Mines and Miners Act was changed to a cause of action accruing under the Injuries Act, was made January 9, 1905. To the declaration as then amended and to the additional counts thereafter filed by appellee, the plea of the Statute of Limitations interposed by appellant presented a complete bar, and the court erred in sustaining appellee's demurrer thereto.

The judgment will be reversed and the cause remanded with directions to the Circuit Court to overrule the demurrer to the plea of the Statute of Limitations.

*Reversed and remanded with directions.*

Appellee having admitted of record that there were no additional facts not already appearing of record which could be pleaded to avoid the legal effect of the demurrer to the plea of the Statute of Limitations, it is ordered that the order heretofore entered by this court reversing the judgment of the Circuit Court be set aside, and that the demurrer interposed by appellee to appellant's plea of the Statute of Limitations be overruled and that final judgment be entered in this court against appellee in bar of his action. Dated May 23, 1907.

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**Commissioners of Lake Fork Special Drainage District  
v. Joseph H. Biggs.**

**BRIDGE—duty of drainage district to construct.** Where a drainage district pursuant to statute enlarges a natural channel, rendering impassable without a bridge what was before passable, the duty is imposed upon the district to construct a bridge over such channel.

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*Mandamus.* Appeal from the Circuit Court of Piatt county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

REED & REED, for appellants.

M. R. DAVIDSON and W. G. CLOYD, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee filed his petition for *mandamus* to compel appellants to construct a bridge across the natural channel of a stream flowing through appellee's land. A demurrer to the petition interposed by appellants was overruled by the court, appellants elected to abide their demurrer, and a peremptory writ of *mandamus* was awarded.

The petition alleges that appellee is the owner of certain described real estate lying within the boundary of Drainage District No. 7 in Unity township, Piatt county; that on or about March 16, 1905, appellants having found and determined that the main ditch or drain of the system of drainage of the Lake Fork Special Drainage District did not afford suitable and proper outlet for the waters of said district, determined that it would be necessary to clear and enlarge the natural channel of the Lake Fork of Okaw, lying beyond the boundaries of said drainage district; that said natural channel, above mentioned, passed over the land of appellee and was embraced within the boundaries of said drainage district No. 7; that on September 12, 1890, the then owner of appellee's land conveyed to the commissioners of said drainage district No. 7 a right of way 100 feet wide in said natural channel for the construction and repair of a certain drain or ditch therein across the land of appellee; that on March 16, 1905, appellants entered into a written agreement with the commissioners of said drainage district No. 7, whereby in consideration of the benefits to be derived by the lands in said district No.

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7, and the further consideration that no benefits should be assessed against said district and of one dollar, the said commissioners of district No. 7 granted to appellants the privilege to enter upon the right of way in said natural channel and to clear and enlarge said natural channel; and whereby, in further consideration of the premises, appellants agreed that if under the law in relation to drainage any further burdens should be cast upon them in consequence of the clearing and enlarging of the said natural channel they would fully discharge the same.

The petition further alleges that in pursuance of said agreement appellants cleared and enlarged said natural channel with the object and for the purpose of providing a sufficient outlet for the waters of said Lake Fork Special Drainage District; that the land of appellee is farming land and lies upon each side of said natural channel where the same was cleared and enlarged; that prior to the clearing and enlarging of said natural channel by appellants appellee could farm his land across said natural channel without trouble, but that since said natural channel has been cleared and enlarged he cannot cross the same without a bridge, and that a bridge across the same is necessary to secure to him the use of his said land. The petition alleges a demand by appellee upon appellants to construct a necessary bridge across said channel and that appellants refused so to do.

By section 41 of the Farm Drainage Act (Hurd's Stat. 1905, 810) it is provided: "After the completion of the work, the commissioners shall thereafter keep the same in repair, and if they find by reason of error in locating or constructing the ditches, or any of them, or from other causes, the lands of the district are not drained or protected as contemplated, or some of them receive partial or no benefit, they shall use the corporate funds of the district to carry out the original purpose, to the end that all lands, so far as

practicable, shall receive their proper and equal benefits as contemplated when the lands were classified. If it be necessary to clear and enlarge any natural or artificial channels lying beyond the boundaries of the district, to obtain a proper outlet, the commissioners shall use the corporate funds for this purpose, and if the necessary privileges cannot be obtained for this by agreement, with the landowners or the commissioners, if the land or lands through which such outlet must be made are within another organized district, the commissioners may acquire the same by condemnation under the act for exercising the right of eminent domain; Provided in all such cases if sufficient funds are not on hand, the commissioners shall make a new tax levy." The same section further provides that where an upper district enlarges or improves a natural or artificial channel beyond the boundaries of its district, it may collect from the lower landowners or drainage district, such amount as may be considered a fair compensation for the benefit received by the lands below the upper district.

Section 74 of the same act provides, as follows:

"There shall be constructed at least one bridge or proper passage-way over each open drain where the same crosses any enclosed field or parcel of land, and the cost of construction thereof shall be charged as part of the costs of construction of such drain; and such bridge or passage-way shall be maintained by the commissioners from the district funds, provided, the commissioners may contract with owners of land crossed by such drain to maintain such bridges or crossing."

In *Union Drainage District v. O'Reilly*, 132 Ill. 631, appellant acquired by condemnation the right to enlarge a natural channel lying without its boundaries and through the enclosed field of appellee, and the judgment of the lower court awarding a peremptory writ of *mandamus* to compel appellant to construct a bridge across such natural channel after its enlargement, was affirmed. In that case the court said:

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"When the district condemned the right to enlarge this channel and entered upon the work, it necessarily took the privilege charged with the duty imposed by the statute. And having by their open ditch rendered the channel, which was before passable, wholly impassable, the duty attached, in all respects, to bridge the same, as if it were an open drain or ditch made through enclosed land within the district."

The statute expressly provides that a drainage district may acquire the right to enlarge a natural channel lying without its boundaries, by agreement with the landowner or with another drainage district as well as by condemnation, and we perceive no reason why the like duty to construct a bridge when necessary, should not be imposed upon the dominant district in the one case, as in the other.

True, the natural channel across the land of appellee was within the boundaries of district No. 7, and that district had control and supervision of such channel for all purposes necessary to the proper drainage of the lands lying within its boundaries, and such control and supervision was not relinquished by its agreement with appellants, but by clearing and enlarging such channel, to make it adequate for their purposes, appellants imposed an additional and permanent burden upon appellee, and one for which district No. 7 was not primarily responsible. The work of clearing and enlarging the natural channel was done by appellants for the benefit of their district, and with the right to clear and enlarge the channel attaches the right to enter the channel and maintain it. For these purposes, the channel became, by the agreement, a part of the Lake Fork Special Drainage District, and as the necessity for a bridge across the channel was created by the act of the appellants we think the duty of constructing such bridge should be imposed upon them.

The judgment of the Circuit Court will be affirmed.

*Affirmed.*

**Henry Wey v. George E. Dooley.**

1. **WILL—how to be construed.** A will is to be construed according to the intention of the testator, which intention is to be gathered from a consideration of the entire instrument.

2. **DETERMINABLE FEE—when will creates.** Held, that the will in question in this cause created a base or determinable fee, as distinguished from one in fee simple.

3. **PLAINTIFF—who proper, in action at law.** In an action upon a contract the party named in the contract who is seeking to enforce the same is the proper plaintiff and not the assignee of such party, as choses in action are not assignable at law so as to enable the assignee thereof to sue in his own name.

4. **USED—need not be made party of record.** It is not necessary that the name of the party for whose use the suit is brought shall appear in the record.

**Assumpsit.** Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**WELTY, STERLING & WHITMORE and EARLE D. RIDDLE,** for appellant.

**BARRY & MORRISSEY and OWEN & OWEN,** for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

October 25, 1905, appellant executed a contract in writing to sell and convey to appellee on or before March 1, 1906, 80 acres of land in McLean county. The contract provided that appellant should furnish to appellee by December 1, 1905, an abstract showing a good record title to the premises free and clear of all encumbrances, except a certain lease, which was to be assigned, and further provided that either party failing to comply with the terms thereof, should forfeit to the other party \$1,000 as fixed and liquidated damages. Upon the execution of the contract appellee paid to appellant \$500 to apply upon the purchase price.

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On October 26, 1905, appellee by written indorsement on the contract assigned the same to E. R. and Lydia B. Ratliffe. Appellant when notified of the assignment said he would have nothing to do with the assignees, but would look to appellee with whom he had the contract. Thereafter, appellee submitted the abstract of title to the property to his attorneys, who advised him that appellant had only a life estate therein.

March 1, 1905, appellant tendered to appellee a deed of the property together with an abstract of title and demanded the balance of the purchase money. Appellee then tendered the balance of the purchase money, but refused to accept the title offered. Appellant then tendered a deed of the property to the Ratliffes, which was not accepted by them. March 16, 1905, appellee instituted this suit in assumpsit against appellant to recover the \$500 paid upon the purchase price of the land, and \$1,000 liquidated damages, and upon a trial by the court, without a jury, there was a finding and judgment against appellant for \$1,535.

Appellant derives his title to the real estate contracted to be sold, through the will of Philip Hileman, deceased. The will provides for the payment of the testator's debts and funeral expenses, and gives all the remainder of the testator's property to his wife for her natural life, and provides that after her death the personal property shall be divided equally between John Henry Hileman and appellant. The subsequent clauses of the will, so far as they are here material, are as follows:

"Third. I give and bequeath to said Henry Hileman (son of Thomas Wey) the north half of the southwest quarter, section twenty (20) in town twenty-three (23) and range five (5) east of the third P. M., to come into possession of the same at the death of my wife, Margaret Hileman. Provided: If the said Henry Hileman should die before arriving at the age of twenty-one years, or *die leaving no bodily heirs*, then the above devised property to him shall be equally

divided between my full brothers and sisters, or should any be dead, leaving heirs, then the share of deceased to go to his or her heirs.

"Fourth. I give and devise after the death of my wife, Margaret Hileman, all the rest, residue and remainder of my real estate, of every name and nature whatsoever, to my son, John Henry Hileman. Provided: If the said John Henry Hileman should die before arriving at the age of twenty-one years, then I desire that all property devised to him shall be equally divided between my full brothers and sisters, or if any be dead, a share to the heirs of deceased: except one thousand (\$1,000) dollars which I desire to be equally divided among the brothers and sisters of my wife, Margaret Hileman.

"Fifth. In case of the death of my wife, Margaret Hileman, before the above named John Henry Hileman and Henry Hileman arrive at the age of twenty-one years, I hereby appoint my executor, whom I shall hereinafter name and appoint, to hold the above named property, real and personal, in trust for the benefit of the said heirs, John Henry Hileman and Henry Hileman (son of Thomas Wey) until they each arrive at the age of twenty-one years \* \* \* ."

Henry Hileman, son of Thomas Wey, mentioned in the will is Henry Wey, the appellant, and the real estate contracted to be sold is described in the third clause of the will.

It is insisted on behalf of appellant, that the words in the third clause of the will, viz., "Provided: If the said Henry Hileman should die before arriving at the age of twenty-one years, or die leaving no bodily heirs," refer to the death of appellant before the death of the testator, and that appellant having survived the testator, the absolute fee to the real estate described vested in him. On behalf of appellee it is insisted that said words refer to the death of appellant leaving no bodily heirs surviving, at any time, whether before or after the death of the testator, and that appellant, therefore, took by the will merely a life estate, or a base or determinable fee.

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The intention of the testator is to be gathered from a consideration of the entire instrument. It is to be observed that the testator in disposing of his personal estate provided that at the death of his wife it should be divided between his son John Henry and appellant, without any restrictive provision limiting the estate of the said beneficiaries therein, or substituting other beneficiaries in any event.

The fact that the testator created a life estate for his wife in the personal property, and provided that upon her death it should be equally divided between his son and appellant, clearly suggests that the testator assumed or anticipated that his wife would survive him and that his son and appellant would survive his wife. The fact also that the testator in the third clause of his will used the language above quoted, evidences that he intended to dispose of the real estate therein described, in a different manner than that in which he disposed of his personal property, but as his wife was also given a life estate in the realty he manifestly expected appellant to survive her. The case of Kohtz v. Eldred, 208 Ill. 60, cited by counsel for appellant as sustaining their construction of the will, is distinguishable from the case at bar in this, that in the Kohtz case no life estate intervened, and the beneficiary named in the will was an heir of the testator. In the case at bar appellant was not an heir of the testator, and the rule that a construction will be adopted which will favor the heir is not applicable.

We fully recognize the generally established rules applicable to the construction of wills, urged by counsel for appellant as controlling in this case, viz., that a construction will be favored which will give the absolute fee to the first taker, that where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over in case of his death without issue, the words refer to a death without issue during the lifetime of the testator, and that

the primary devisee surviving the testator takes an absolute estate in fee simple. *Kohtz v. Eldred, supra.* But these rules have their well-recognized exceptions.

In *King v. King*, 215 Ill. 100, it was said: "The rule that where there is a bequest to one person absolutely, and in case of his death without issue, to another, the contingency referred to is a death in the lifetime of the testator, does not apply when a point of time, other than the death of the testator, is mentioned, to which the contingency can be referred, or to a case where a life estate intervenes, or where the language of the will evinces a contrary intent." And in *Bradsby v. Wallace*, 202 Ill. 239, where a will containing a somewhat similar provision was under consideration, the court quoted approvingly from its former decisions, as follows: "When the death of the first taker is coupled with circumstances which may or may not take place, as for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and general meaning of the words, upon death under the circumstances indicated, at any time, whether before or after the death of the testator."

We are clearly of opinion that the language in the third clause of the will here involved should be held to refer to the death of appellant before arriving at the age of twenty-one years, or leaving no bodily heirs, at any time, whether before or after the death of the testator, and that the estate thereby devised to appellant is, merely, a base or determinable fee.

Appellee having assigned the contract to the Ratliffes, it is insisted that he could not bring suit to recover thereon in his own name, without a re-assignment of the contract to him, or that, in any event, the suit should have been brought in the name of appellee for the use of the assignees. The contract is not assignable at law so as to vest in the assignees the right to bring suit thereon in their own names, and

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the suit was, therefore, properly instituted in the name of appellee.

It must be regarded as settled law in this state, that it is not necessary that the name of the party for whose use a suit is brought shall appear in the record. Union Nat. Bank v. Barth, 179 Ill. 83; Meyer v. Ross, 119 Ill. App. 485. In Knight v. Griffey, 161 Ill. 85, it was said: “It is no concern of a defendant in an action upon a bond for whose use the action is instituted.” In Ill. Conference v. Plagge, 177 Ill. 431, it was said “whether others have an equitable or beneficial interest in the proceeds of the collection of a note need not be disclosed by the pleadings in an action at law by the party holding the legal title to the note. It is sufficient, in such case, the action is in the name of the holder of the legal title. Persons entitled to the beneficial interest may interfere in such actions and their rights will be protected, but in the absence of such interference defendants have no concern therewith.”

The judgment of the Circuit Court is right and will be affirmed.

*Affirmed.*

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**Springfield Mutual County Fire Insurance Company v.  
George A. Merriman.**

**ARGUMENT OF COUNSEL**—when *improper*, *will not reverse*. Notwithstanding the argument complained of was improper, a reversal will not be awarded unless there is probability that another trial would result in a different verdict.

**Assumpsit.** Appeal from the Circuit Court of Sangamon county: the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**ROBERT H. PATTON**, for appellant.

JOHN C. SNIGG and C. F. MORTIMER, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellee against appellant to recover upon two policies insuring the property of appellee against loss or damage by fire or lightning. The first count of the declaration declares upon a policy insuring a hay shed for the sum of \$565, and the second count declares upon a policy insuring hay in the shed. The loss or damage is alleged to have been occasioned by lightning. The second count of the declaration was excluded from the jury, and upon the first count there was a verdict and judgment against appellant for \$565.

On May 11, 1905, a large hay shed, 96 feet in length, 50 feet in width, 21 feet to the eaves and 45 feet to the top of the gable, was almost totally destroyed during a severe electrical and wind storm.

It is insisted on behalf of appellant that there is no evidence in the record tending to show that lightning was the proximate cause of the damage; that the damage was occasioned wholly by a wind storm; that conceding that some portion of the damage was occasioned by lightning, the evidence does not disclose what portion of the damage was so occasioned by lightning independent of the damage caused by the wind, and, therefore, appellee established no basis for a recovery.

There is evidence tending to show that many of the posts, timbers and boards, of which the shed was constructed, were split, splintered, shattered and broken; that the boards and timbers were split along the line of the nails; that the iron track, upon which the hay fork was operated, appeared to have been recently blistered by intense heat. It is not controverted that a severe storm was in progress at the time the shed collapsed. John Cherry, the only person who was on the premises during the storm testifies that he saw

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Springfield M. C. Fire Ins. Co. v. Merriman.

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the lightning strike the shed and "knock it to picces;" that the wind came immediately after.

True, it appears from the evidence that some of the boards were found a considerable distance from the site of the shed, but the evidence also shows that the greater portion of the shattered material remained where it fell. No fire resulted, and there is no proof that any of the lumber had the appearance of having been seared or burned.

The effects of lightning discharges are so various and unique, that they are difficult of explanation, even by those most versed in the science of electricity. It is a matter of common knowledge and observation that trees shattered by a stroke of lightning frequently manifest no evidence of having been burned or seared.

We think the jury were justified in finding that the proximate cause of the destruction of the shed was a stroke of lightning. Lightning having been the proximate cause of the damage, it cannot affect the right of appellee to recover therefor, that some damage was also done by the wind. Without doubt the burden of proof was upon appellee to show not only that the damage was caused by lightning, but also the amount of such damage, and we are of opinion that there is sufficient evidence in the record to sustain the verdict of the jury upon the latter issue. That the task of separating the damage done by lightning from the damage which may have been occasioned by the wind was a difficult one, must be conceded, but it was one peculiarly within the province of the jury to perform. The evidence discloses the value of the shed as a whole, and the character of the damage sustained by its various parts, and the jury were thus afforded the means of determining the amount of appellee's loss under the policy.

The second instruction given at the instance of appellee is said to be erroneous because it assumed there is evidence tending to show the amount of damage done by the lightning. The record, in fact, contains

such evidence, and the trial court necessarily so held when it refused the peremptory instruction tendered by appellant.

Whether there was any evidence in the record tending to prove the amount of damages sustained by appellee was a question of law for the trial court, and the court having held that there was such evidence, it, not improperly, assumed the existence of such evidence, and informed the jury, that, if, from the evidence in the case, they should find the issues for appellee, and that appellee had sustained damages by the shed being struck by lightning, as charged in the declaration, they might "estimate such damages by all the evidence and testimony in the case bearing upon that question."

Lastly, it is urged that appellant was prejudiced by certain inflammatory remarks of counsel for appellee in his closing argument. The remarks of counsel for appellee were improper, and if there was any probability that another trial of the case would result differently, we might be disposed to reverse the judgment for that reason. The prejudicial effect of the remarks was, however, largely overcome by the action of the trial court in promptly and emphatically reprimanding offending counsel and instructing the jury to wholly disregard such remarks and not permit themselves to be influenced or prejudiced thereby. The judgment of the Circuit Court is affirmed.

*Affirmed.*

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#### J. W. Mastin v. E. A. Richardson.

JUDGMENT BY CONFESSION—*duty of court to set aside.* A motion to open a judgment and for leave to plead to the merits is addressed to the sound judicial discretion of the court, and involves the exercise by the court of equitable power with respect to its own judgment; and where the defense sought to be pleaded appears from the showing made to be complete, the judge to whom

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the motion is addressed should open up the judgment and allow the defense to be interposed.

Judgment by confession. Error to the Circuit Court of Shelby county; the Hon. WILLIAM M. FARMER, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

E. J. MILLER, W. K. WHITFIELD and CHAFFEE & CHEW, for plaintiff in error.

WALTER C. HEADEN, for defendant in error.

MR. JUSTICE BAUME delivered the opinion of the court.

October 18, 1905, a judgment by confession in favor of defendant in error, E. A. Richardson, against plaintiff in error, J. W. Mastin, and one H. S. Batman, was entered in vacation in the Circuit Court of Shelby county for \$5,506, upon a promissory note and warrant of attorney, as follows:

“\$5,250.00. SHELBYVILLE, ILL., August 23, 1905.

“Six months after date, for value received, we promise to pay to the order of John M. Wolf,

“Five thousand two hundred and fifty dollars, at Citizen’s National Bank, of Shelbyville, Illinois, with interest at seven per cent. per annum from date until paid.

“And to secure the payment of said amount, I (or we) hereby authorize irrevocably any attorney of any court of record of the United States to appear for me (or us) in such court, in term time or vacation, or at any time hereafter, and confess a judgment without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs, and \$200 attorney’s fees to be assessed as costs and made a part of the judgment entered hereon and to waive and release all errors which may intervene in any proceedings and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my (or our) said attorney may do by virtue thereof.

H. S. BATMAN,  
J. W. MASTIN.”

On the back of which note appears the following endorsement: "John M. Wolf."

Execution was issued on said judgment directed to the sheriff of Moultrie county to execute and was by him immediately levied on certain real estate of plaintiff in error, and said real estate was advertised for sale on November 13, 1905. On that day, upon the convening of the November term of court, plaintiff entered his motion to stay execution upon the judgment and for leave to plead. The motion of plaintiff in error was supported by several affidavits and upon consideration thereof the court entered an order staying the execution. Thereafter, defendant in error was granted leave to file additional affidavits in support of his motion, and upon a further consideration by the court the order theretofore entered staying the execution was vacated and the motion to open the judgment and for leave to plead was denied. This writ of error is prosecuted to reverse such ruling of the Circuit Court.

The only material question here involved is presented by the affidavit of plaintiff in error which states that the said note and power of attorney was never executed by him; that he never received any money on said note and does not owe the same or any part thereof; that said note has been altered and changed without his knowledge or consent from a note for \$250 to a note for \$5,250; that at the time he signed said note it was only for the sum of \$250 and that the words "five thousand" were written in the note before the words "two hundred and fifty" and the figure "5" was written before the figures "250," without his knowledge or consent and after the said note was signed by him. The statement of plaintiff in error that the alleged alterations and changes had been made in the note is corroborated by the affidavits of several persons who give it as their opinion, from an inspection of the note, that the same had been so altered and changed.

The statements in the affidavit of plaintiff in error

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are denied in affidavits filed by John M. Wolf, H. S. Batman and Nina Inman, a clerk and stenographer in the employ of Wolf, and such denial is supported by the affidavits of defendants in error and other persons, who, upon an inspection of the note, give it as their opinion that it appears regular upon its face and has not been altered or changed. The original note has been certified to this court for inspection.

A motion to open a judgment and for leave to plead to the merits is addressed to the sound judicial discretion of the court, and involves the exercise by the court of equitable power with respect to its own judgments. *Blake v. State Bank*, 178 Ill. 182.

The general rules applicable to cases involving changes and alterations in a promissory note are thus stated in *Merritt v. Boyden & Son*, 191 Ill. 136: "When a note is changed materially either by a payee or transferee, not only is it vitiated and destroyed in the hands of the party responsible for the alteration, but no recovery can be had upon it against the maker by a person into whose hands it has come after the change was made, even though the latter be a *bona fide* indorsee for value without notice of the alteration. Where a note is complete at the time when it is signed by the maker, its subsequent alteration by raising the amount thereof through obliteration of the same by the use of any chemical process, or other ingenious device, without the knowledge or consent of the maker, will discharge him from liability upon the note."

Some distinction is sought to be made tending to limit the application of the foregoing rules in cases where the notes although complete when executed are so drawn as to leave a space permitting words or figures to be prefixed or suffixed to the amount stipulated to be paid in the body of the notes, thereby increasing such amount, but *Greenfield Savings Bank v. Stowell*, 123 Mass. 196, the best considered case to which our attention has been directed, and the reasoning in which appeals to us as unanswerable and con-

clusive, does not recognize such distinction. There is a clear distinction, however, between a case such as that at bar, and one in which the note when executed is not a complete instrument and in which the maker of the note leaves blank spaces wherein may be inserted the amount to be paid, the time of maturity, the rate of interest, etc.

In *Vennum v. Carr*, 130 Ill. App. 309, this court intimated very strongly that in an application to open a judgment by confession and for leave to plead to the merits, where the affidavit of the defendant shows a *prima facie* good defense counter affidavits are not permissible, and leave to plead should be granted and the issue of fact submitted to a jury.

The facts averred in the affidavit of plaintiff in error constitute, *prima facie*, a complete defense to a suit upon the note, and upon a consideration thereof and inspection of the original note we are of opinion that the trial court should, at least, have opened the judgment, allowing the same to stand as security for the amount due, if any, and permitted plaintiff in error to plead to the merits, and submitted the issues of fact involved to a jury.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

*Reversed and remanded.*

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#### J. G. Koehn v. Charles Tomlinson.

INSTRUCTION—*must be predicated upon evidence*. An instruction should not be given which submits to the jury a hypothetical case not supported by any evidence in the record.

Action commenced before justice of the peace. Appeal from the Circuit Court of Vermilion county; the Hon. E. R. E. Kimball, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

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Koehn v. Tomlinson.

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JOHN H. LEWMAN, for appellant.

WALTER V. DYSERT, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee was the owner of a farm which he leased to Ora Coon, for one year from March 1, 1904, at a rental of one-half of the crop, to be hauled to the elevator at Henning, without expense to appellee, and there divided. The lease also provided that said Coon should pay to appellee \$112.50 on September 1, 1904, as evidenced by a certain note, a copy of which note was incorporated in the lease, the note being given for rent of pasture. In September, 1904, appellant, a grain buyer at Potomac, advanced to Coon \$599 upon the purchase price of the latter's share of the corn crop to be thereafter sold and delivered to appellant.

In November, 1904, appellee, having been informed that Coon had contracted to sell his half of the corn to appellant, went to Potomac for the purpose of interviewing appellant relative to the matter. The evidence as to what was said and as to what agreement, if any, was entered into between appellant and appellee upon that occasion is inextricably conflicting. Appellee testifies that he then informed appellant, that he (appellee) had a written lease with Coon and held Coon's notes for \$112.50; that he intended to hold Coon's half of the corn raised upon the leased premises for the amount due upon said note and for other rent due him; that by the terms of the lease the corn was to be delivered at the elevator in Henning, but that he (appellee) did not care where it was delivered so long as he received his rent; that appellant then told him (appellee) to haul as nearly one-half of the corn as he could to Henning, and to haul the other half to Potomac, and he (appellant) would pay appellee for the corn hauled to Potomac; that appellant stated that he regretted the matter of the note and inquired

whether it was given for that year's rent of the land and that upon appellee's statement that it was, appellant said: "Well, I will have to pay it then." Appellant testifies that appellee asked him how much money he (appellant) had advanced to Coon on Coon's half of the corn; that he (appellant) then informed appellee, whereupon the latter remarked, "Well, there is no doubt you will get your money all back and more too, because there is plenty of corn;" that nothing was said by either party about paying the Coon note; that appellee said he had a note against Coon for \$112.50, which he would send to Mr. Redden at Rossville for collection. Appellant's version of the transaction was corroborated by the testimony of the witness Rice, who claims to have been present, and to have heard all that was said on the occasion.

This was a suit instituted before a justice of the peace, by appellee against appellant, to recover the amount due on the Coon note, and also the value of a certain quantity of corn in excess of one-half of the corn raised on the leased premises, which it is claimed by appellee was delivered to appellant at Potomac. Upon appellee's appeal to the Circuit Court there was a trial by jury resulting in a judgment against appellant for \$200.

A question affecting the jurisdiction of the court is raised by appellant, but in view of the fact that the judgment must be reversed and the cause remanded for another trial because of the admission of incompetent evidence, and the giving of an erroneous instruction, we do not deem it necessary to now discuss and determine such question. Upon another trial an opportunity will be afforded appellee to enter a disclaimer, before verdict, as to any claim in excess of \$200, and thus avoid the question now presented by the record.

Evidence as to the price per bushel, or in gross, received by appellee for the corn delivered at Henning was improperly admitted. It neither tended to show

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Koehn v. Tomlinson.

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the quantity of corn received by appellant at Potomac, nor the market value of the corn at that place. In fact, the record is barren of any competent evidence which could have enabled the jury to determine the market value of the corn at Potomac.

At the instance of appellee the court gave to the jury an instruction as follows:

“You are instructed that, if you believe from the preponderance of the evidence that the defendant Koehn prior to the delivery of the grain in question at the elevator at Henning and Potomac, had an agreement with the plaintiff with reference to the delivery of the grain and as to how much the defendant had let Koehn, the tenant, have, if any, money and that the defendant then and there informed the plaintiff of such amount, and you further believe that the defendant then and there told the plaintiff that if he, the plaintiff, would not place a \$112.50 note with Redden of Rossville for collection against Coon that the defendant Koehn would retain sufficient money to pay plaintiff the amount of said note from the tenant’s share of the grain raised on the farm and delivered to the defendant and that the defendant would also retain out of the excess of one-half of the grain raised and delivered to Henning and Potomac a sufficient amount of money to pay plaintiff’s rent, for the use of said premises and that a greater portion of said crop than one-half of the tenant’s share was actually delivered at Potomac and accepted by the defendant and that neither defendant Koehn nor the tenant Coon has paid the plaintiff the amount of said note or the unpaid balance of plaintiff’s rent for said premises, then your verdict should be for the plaintiff.”

It is conceded by counsel for appellee that the instruction is inaccurate in that there is no evidence in the record even tending to show that “the defendant then and there told the plaintiff that if he, the plaintiff, would not place a \$112.50 note with Redden of Rossville for collection against Coon, that the defendant Koehn would retain sufficient money to pay plaintiff,” etc.

It is well settled that an instruction should not be given which submits to the jury a hypothetical case not supported by any evidence in the record. C., R. I. & P. Ry. Co. v. Lewis, 109 Ill. 120; I. C. R. R. Co. v. Sanders, 166 Ill. 270. The conflict of evidence in this case calls for special accuracy in the instructions.

It is urged that the court erred in giving certain other instructions offered on behalf of appellee, and in refusing certain instructions offered on behalf of appellant, but an examination of the instructions indicated does not disclose any error in that regard. There was no error in admitting the note and lease in evidence. Appellee testified that he exhibited the note to appellant and informed him of the terms of the lease. Appellee's claim was predicated upon his rights under the lease, and the lease was competent evidence establishing such rights.

For error in admitting incompetent evidence and in giving an improper instruction, prejudicial to appellant, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

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#### F. B. Vennum v. J. O. Palmer.

**VERDICT**—when not disturbed as against the evidence. A verdict based upon conflicting evidence will not be set aside on review, in the absence of errors of law, unless the same is clearly and palpably against the weight of the evidence.

Action for fraud and deceit. Appeal from the Circuit Court of Champlain county; the Hon. SOROK PHILBRICK, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

RAY & DOBBINS, for appellant.

F. M. & H. I. GREEN, for appellee.

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Vennum v. Palmer.

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MR. JUSTICE BAUME delivered the opinion of the court.

Appellant brought his action against appellee and W. H. Fisher, to recover damages for alleged fraud and deceit. Upon the trial the suit was dismissed as to Fisher, and there was a verdict in favor of appellee and judgment against appellant for costs. To the original declaration filed by appellant a demurrer was sustained, and appellant electing to abide his declaration there was a judgment against him in bar of his action and for costs, which judgment was, on appeal to this court, reversed and the cause remanded with directions to the Circuit Court to overrule the demurrer. Vennum v. Palmer, 123 Ill. App. 619. After the cause was remanded appellant was given leave to file an additional count to his declaration, which additional count merely restates with greater particularity the allegations of the original declaration, and alleges in substance that defendants intending to defraud the plaintiff represented to him that they knew of a stock of drugs belonging to one O. W. Cassingham at Oakland, Illinois, that could be purchased at invoice price and that the owner would take as part of the purchase money a tract of land located in Kansas, consisting of 338 acres, and that defendants could procure said land at a price less than the price at which Cassingham would accept the same, so that by means of the purchase of the Kansas land and the trading of the same to Cassingham a profit could be made on the transaction; that defendants further represented that they did not have enough money to buy the land and pay the balance and that if plaintiff would join with them that a profit of, to wit, \$5 per acre could be made in the purchase of said land and exchange for said stock of drugs, and if plaintiff would furnish one-half of the money they would divide equally with him the profits derived therefrom; that relying thereon plaintiff accepted said offer; that thereafter without plaintiff's knowledge defendants purchased said lands

for the sum of \$338, and caused the same to be conveyed to Cassingham and did fraudulently conceal from plaintiff the fact that they had purchased the said land at the price of \$338; that thereupon defendants did exchange said lands to said Cassingham and said Cassingham accepted same as \$3,000 of the purchase price of said stock of drugs, at the invoice price of \$6,434.57, leaving a cash balance to be paid of \$3,434.57; that by means thereof plaintiff became liable to pay \$169 as one-half of the purchase price of the Kansas land and the sum of \$1,717.28 as one-half of the balance of the purchase price so agreed to be paid to said Cassingham, yet the defendants well knowing the premises, and meaning and intending to cheat and defraud the plaintiff did falsely represent to him that the total amount in cash paid by the defendants for said Kansas land and the balance of the purchase money to be paid for the stock of drugs was \$4,926.06 and that plaintiff should pay as his half of said investment the sum of \$2,463.03; that the plaintiff relying upon such false representations of the defendants paid to said Cassingham \$2,463.03; that said defendants paid to said Cassingham the sum of \$971.54; that by the terms of said agreement the plaintiff should have paid to said Cassingham the sum of \$1,886.28, and the defendants should have paid to said Cassingham the sum of \$1,548.18. The declaration concludes with appropriate and specific allegations of fraud and damage.

It is insisted by appellant that the decision of this court upon the former appeal is conclusive of his right to recover. Upon the former appeal we were only called upon to determine whether or not appellant's declaration stated a good cause of action. We then held that it did, and we are still of the same opinion, but the present difficulty arises from the fact that a jury impaneled to determine the truth of the allegations of his declaration have found against appellant.

The testimony of appellant and of appellee is in

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direct conflict. Appellant testifies that appellee came to his place of business and stated to him that there was a fine drug stock at Oakland that he (appellee) would like to own, and that he believed there would be money in it; that he had a relative in Kansas who had some land which they (appellant and appellee) could buy at a low price and trade it in on the drug stock and make a profit; that he did not have the money to carry the deal through, but if appellant would furnish the money they could go in as partners and divide the profits; that he could buy the Kansas land at \$5 an acre and trade it in on the stock at \$10 an acre. Appellant further testified that the stock invoiced at \$6,434.57; that the Kansas land was turned in at \$3,000; that he paid to Cassingham, the owner of the drug stock, the difference, or \$3,434.57, and that appellee and Fisher gave him their note for \$971.54, which they subsequently paid, leaving \$2,463.03 as the net amount advanced by appellant; that he was informed by appellee that the profit on the Kansas land was \$1,508.

It is admitted that the Kansas land consisted of 338 acres, and that it was purchased by appellee and Fisher for \$1 per acre.

Appellant seeks to recover one-half of the difference between the price in fact paid for the Kansas land and its price at \$5 an acre which he claims appellee represented to him as being its actual cost.

Appellee denies that he ever told appellant that the Kansas land would cost \$5 per acre, or that he agreed to divide the profits on the transaction with reference to the cost price of the Kansas land. He testifies that he told appellant that he and Fisher owned land in Kansas which they valued at \$5 an acre, and which could be traded in for the drug stock at \$10; that if appellant would furnish the money necessary to make the trade he would allow appellant for his profit in the transaction one-half of the difference between the value of the Kansas land at \$5 per

acre and its value at \$10 an acre, the price at which it was to be traded, which would be approximately \$1,600, and that appellant accepted the proposal as made.

The evidence tends to show that the Kansas land was wholly paid for by appellee and Fisher, and that no part of the money advanced by appellant was applied in its purchase.

Appellant's right of recovery under his declaration is dependent upon his having had an interest in the purchase of the Kansas land. If appellant had been induced to participate in the transaction upon the faith of a representation that the Kansas land could be purchased for \$5 an acre, or that appellee and Fisher had an option on the land at that price, and that a profit could be made by turning it in upon a trade for the drug stock at \$10 an acre, and it developed that appellee and Fisher had purchased the land, or had an option for its purchase at \$1 per acre, there can be no doubt but that he would be entitled to participate in the entire profits of the transaction.

If, however, appellee being the owner of, or having an option to purchase the Kansas land, merely represented to appellant that he owned land which he valued at \$5 per acre; that it could be turned in upon a trade for the drug stock at a valuation of \$10 an acre, and that in consideration of appellant furnishing the money necessary to consummate the trade for the drug stock, he would divide with him the difference between the value of the land at \$5 an acre and its valuation in the trade at \$10 an acre, and appellant accepted such proposition, appellant cannot complain because the Kansas land cost appellee less than \$5 an acre.

The issue involved was purely one of fact and we cannot say that the verdict of the jury is not justified by the evidence.

Some of the instructions given at the instance of appellee are not altogether free from criticism, but, taking all of the given instructions as a series, we think

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they advised the jury as to the law applicable to the issues as made by the pleadings, with substantial accuracy.

The instructions tendered by appellant and refused by the court were sufficiently covered by other instructions given at the request of appellant.

The record being free from substantial error prejudicial to appellant, the judgment of the Circuit Court is affirmed.

*Affirmed.*

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#### Joseph Dyas et al. v. Charles D. C. Dyas.

**DECREE**—when not disturbed as against the evidence. A decree will not be disturbed on review, in the absence of errors of law, as against the evidence, unless the findings of the chancellor are manifestly against the preponderance of the evidence.

Bill of interpleader. Appeal from the Circuit Court of Pike county; the Hon. HANRY HIGBEE, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

MATTHEWS & ANDERSON, for appellants.

WILLIAM MUMFORD, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

In December, 1902, appellants, Joseph Dyas and Mary A. Dyas, husband and wife, and appellee, Charles D. C. Dyas, a son of appellants, purchased a farm in Pike county, Illinois, for \$20,800, which consideration was contributed by the respective parties and made up as follows: Joseph Dyas \$8,000, consisting of a hotel property at Sandwich, Illinois; Charles Dyas \$5,000 in cash; Mary A. Dyas \$2,000 in cash, of which amount \$1,350 was contributed on December 6, 1902, and \$650

at a later date before the transaction was finally consummated; the assumption of a mortgage on the premises for \$4,500, and a note for \$1,300 payable to one McGowan. The title to the farm was taken in the name of Joseph Dyas and Charles D. C. Dyas. It is not controverted that it was understood and agreed at the time the farm was purchased that the interest of Mary A. Dyas therein should be two-sevenths of the one-half owned by Charles, and that Charles should give to his mother a bond, or mortgage, or some instrument in writing evidencing or securing her said interest in the farm. December 6, 1902, Charles gave to his mother a note, as follows:

“SANDWICH, ILLINOIS, Dec. 6, 1902.

Thirty days after date I promise to pay to Mary A. Dyas the sum of \$1,350.00 in contract on farm.

CHARLES D. C. DYAS.”

In December, 1905, one Ream, a real estate agent in Missouri, negotiated a sale of the farm to O. H. Damon of Gibson City, Illinois, whereby the owners were to realize \$20,800, less the agent's commission of \$1,040, as follows: \$7,260 in cash; one note for \$6,700 dated December 12, 1905, payable to Joseph and Charles Dyas, on or before March 1, 1906, at the bank of Mattinson, Wilson & Co., Gibson City, Illinois; the purchaser assuming the payment of a mortgage on the premises for \$4,500, and a note for \$1,300 payable to McGowan.

While the negotiations for a sale of the farm were pending, Charles Dyas, accompanied by Ream, went to the house of appellants in Sandwich, Illinois, for the purpose of inducing them to sell the farm, and to arrange for a division of the proceeds. On that occasion, after some controversy between the parties, the terms of the sale to Damon were agreed upon, as above stated, and Ream drew up an instrument, which was signed by them, as follows:

“SANDWICH, ILLS., 11-8, 1905.

This agreement entered into this day by and be-

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tween Chas. D. C. Dyas of the first part and Joseph Dyas and Mary A. Dyas, his wife, of the second part, agree to give to Chas. D. C. Dyas \$6,300 and all of the corn crop of 1905 and all the stock and tools on the farm now owned and known as the Joseph & Chas. D. C. Dyas farm situated in Pike Co., Levee township and State of Illinois.

Witness our hands and seals this day and date above written signed in presence of I. J. Ream.

CHAS. D. DYAS,

MARY A. DYAS, [SEAL.]

JOSEPH DYAS."

Upon the face of the instrument and below the signatures, the word "over" is written, and on the back thereof appears the following: "one note of \$6700 due March first, 1906, without interest, \$7,260 dollars in cash, and of this amount, \$6,300 in cash goes to Chas. D. C. Dyas when deed is delivered to Mattinson & Wilson Bank at Gibson City, Ill., which is mutually agreed upon by all concerned."

The cash payment of \$7,260 was received by Joseph Dyas, and thereafter the note for \$6,700 was paid by Damon to Mattinson, banker at Gibson City. Thereupon Mattinson, Wilson & Co. filed their bill of interpleader, alleging the payment to them of said sum of \$6,700; that said money was claimed by appellants Joseph and Mary Dyas, and by Charles Dyas and that each of said parties had notified the complainants of their respective claims and threatened suit to recover the same. The appellants and Charles Dyas were made parties defendant to the bill of interpleader and filed their respective answers thereto.

The answer of Joseph Dyas admits the receipt by him of \$7,260, being \$280 in excess of one-half of the purchase price of the farm. His answer further asserts the right of Mary Dyas to \$2,000 of the proceeds of said farm and offers to turn over to her the \$280 in his hands to apply on her claim. The answer of Mary Dyas alleges the payment by her of \$2,000 upon the purchase price of the farm; the agreement

that in consideration thereof she should have a two-sevenths in the one-half interest in the farm conveyed to Charles Dyas, and the giving to her by said Charles Dyas of the note for \$1,350, heretofore mentioned.

The answer of Charles Dyas sets up the agreement of November 8, 1905, as a final settlement of all matters of difference between the parties as to the division of the proceeds of the farm, and as establishing his right to \$6,300 of said proceeds.

It is conceded that the bill of interpleader was properly filed.

The decree of the Circuit Court finds that by virtue of the agreement of November 8, 1905, Joseph and Mary Dyas agreed to give to Charles Dyas \$6,300 out of the purchase price of the farm and all the corn crop of 1905 and all the stock and tools on said farm; that the claim of Mary Dyas for \$1,350 and for \$650 for moneys claimed to be advanced by her to Charles Dyas cannot under the pleadings and evidence be sustained; that the decree shall be without prejudice to Mary Dyas as to her said claims, and that her said claims cannot be adjudicated in the proceeding for the reason they are without equity. The decree dismisses the claims of Mary Dyas for want of equity, and directs Mattinson, Wilson & Co. to pay to Charles Dyas out of the moneys paid to them by O. H. Damon on his note for \$6,700, the sum of \$6,300, and to pay to Mary Dyas the excess over \$6,300.

Appellants attack the agreement of November 8, 1905, upon the ground of fraud, alleging that it was signed by them at a time when they were unable, on account of failing sight and darkness, to read the agreement; that the contents of the agreement was misrepresented to them by the agent, Ream; that they relied upon Ream to read the agreement to them and that he fraudulently misread the same. It may well be doubted whether the word "over" which appears on the face of the agreement and the matter which appears on the reverse side of the sheet was written

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Dyas v. Dyas.

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upon the instrument when it was signed by appellants, but an examination of the records fails to disclose that fraud was practiced in securing the signatures of appellants to the agreement which precedes their signatures.

It is insisted on behalf of appellee that the agreement mentioned constituted a complete and final settlement of all matters in controversy between appellee and Joseph and Mary Dyas, and of any claim against appellee growing out of the contribution by Mary Dyas of the sum of \$2,000 toward the purchase price of the farm.

The evidence tends to show that upon the occasion when the agreement was signed, appellee spent several days at the home of appellants, and that during that time there was much controversy regarding certain claims which appellee was urging, growing out of transactions covering a long period of years. The claims made by appellee appear to have related to money due him for services while appellant Joseph Dyas was conducting a hotel and for money advanced during that period.

There was also a claim by appellee that his father had appropriated the proceeds of a note for \$250 belonging to appellee, and a counter claim by Joseph Dyas arising out of a transaction regarding certain railroad securities.

While the evidence bearing upon the claims of the respective parties is too vague and uncertain to enable us to arrive at any satisfactory conclusion as to their merits, it is beyond doubt that such claims were the subject of controversy between the parties upon the occasion when the agreement was signed, and the evidence warrants the conclusion that such claims were taken into consideration in arriving at the terms of the agreement.

There is evidence tending to show that the proposition to give appellee \$6,300 of the proceeds of the sale, and the corn crop and personal property on the

farm, emanated from Mary Dyas; that appellee had insisted that he be paid \$7,000 in cash in addition to the crop and personal property, and that he accepted the terms embodied in the agreement as being the best obtainable.

The evidence further justifies the conclusion that the claim of Mary Dyas against appellee for \$2,000 contributed by her toward the purchase price of the farm was settled by the agreement. The proceeds of the sale available for division between the parties in interest amounted to \$13,960. Of this amount, not considering any claims arising out of other matters, Joseph and Charles Dyas would each be entitled as among themselves, to one-half, or \$6,980. It is clear that the purpose of the agreement was to fix the amount which appellee was to receive, and not to determine the respective interests of the several parties in the entire proceeds, because the entire proceeds are not mentioned in the agreement, and no disposition is made of the remainder of the proceeds not given to Charles Dyas. If the only purpose of the agreement had been to secure a division of the proceeds between Joseph and Charles Dyas there would have been no occasion for Mary Dyas to become a party to it and the fact that she was a party to it strongly suggests that it was entered into for the purpose of settling the rights of appellee as against both of the appellants. The only reasonable inference to be drawn is, that Joseph and Mary Dyas had entered into some arrangement relative to the division between themselves of the remainder of the proceeds.

True, Mary Dyas did not, at the time the agreement was made, surrender to Charles his note for \$1,350 which she then held, but we do not consider this circumstance sufficient in itself to negative the conclusiveness of the agreement as a settlement of her claim against Charles. There is evidence tending to show that in consideration of the settlement evidenced by the agreement Joseph Dyas promised to pay his wife

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the amount of her claim against Charles, and that when the latter requested his mother to surrender his note, she refused to do so upon the ground that she had not then received the money due her, and desired to retain the note as evidence of the debt.

A correct solution of the issues here involved is dependent upon the weight to be given to the testimony of the several witnesses. The evidence is conflicting, and the chancellor who saw and heard the witnesses testify was manifestly much better able to weigh their testimony and arrive at the truth than we are.

A careful consideration of the record fails to disclose that the findings of the chancellor are palpably erroneous, and the decree will be affirmed.

*Affirmed.*

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#### The Patton & Gibson Company v. Shreve & Kelso.

1. **CONTINUANCE**—*diligence essential to, as matter of right.* The denial of a motion for a continuance because of the absence of a material witness, is not error, where a showing of diligence in seeking to obtain the attendance of such witness does not appear.

2. **NUL TIEL CORPORATION**—*what proof sufficient to meet plea of.* Held, that in this case that it was not necessary under a plea of *nul tiel* corporation for the plaintiff to show that it was a corporation *de jure* and that parol evidence that the plaintiff was known and transacted business as a corporation was proper and sufficient to meet the plea.

3. **COMMON COUNTS**—*when objection to right to recover under, comes too late.* It is too late first to object upon appeal that no recovery can be had under the proof because the common counts only had been filed.

**Assumpsit.** Appeal from the County Court of Macon county; the Hon. DONALD McCORMICK, Judge, presiding. Heard in this court at the May term, 1906. Affirmed. Opinion filed June 1, 1907.

BLINN & COVEY, for appellant.

KING & MILLER, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellant, The Patton & Gibson Company, contracted with the Chicago & Alton Railroad Company, to construct a portion of its roadbed between Springfield and Bloomington. The contract required the excavation of certain cuts, the filling of certain ditches and making certain fills in accordance with the plans and specifications and grade stakes prepared and set by the engineers of the railroad company.

A portion of the work to be performed by appellant under its contract was sub-let by it to appellees, Shreve & Kelso, under a proposition and acceptance, constituting a contract therefor, as follows:

"LINCOLN, ILLINOIS, October 7, 1905.

PATTON, GIBSON COMPANY,

Atlanta, Ill.

DEAR SIR:—We, the undersigned, Geo. W. Shreve and T. W. Kelso, herewith propose to do the team work you have between Lincoln and Sherman, based on a haul of 500 feet at 15 cents per cubic yard. Same to be completed by January 1st, 1906. Based on the work 8 teams would do. You pay us on or before the 15th of the month ninety per cent of the amount taken out the previous month. The balance or ten per cent to be retained until completion of the work.

Yours respectfully,

GEO. W. SHREVE.

T. W. KELSO.

Accepted,

THE PATTON & GIBSON COMPANY,  
by J. R. PATTON."

A disagreement having arisen with reference to the quality and quantity of work done by appellees under their contract, they brought suit in *assumpsit* to recover from appellant the amount claimed to be due them, and were awarded a verdict and judgment against the appellant for \$459.43.

It is first urged that the court erred in overruling

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appellant's motion for a continuance, in support of which appellant filed an affidavit setting up the absence of a material witness. An examination of the record discloses that on March 12, 1906, the cause was set for trial by agreement of the parties for March 21st; that on the latter date, the cause was continued by agreement of the parties to March 30th; that on March 30th, there was a further continuance, by agreement, until April 2nd, on which day the cause came on for trial and the motion for continuance was interposed. The affidavit then filed in support of the motion sets up that the absent witness left the State of Illinois thirty days prior to April 2nd, and that until three days prior thereto it was supposed that said witness was still in the employ of the Chicago & Alton Railroad Company, and within the jurisdiction of the court. Clearly, the facts set forth in the affidavit, taken in connection with the state of the record involving the several settings of the case for trial and continuances by agreement of the parties, of which the court took judicial notice, did not show such diligence on the part of appellant as should have moved the court to grant the continuance.

To the common counts filed by appellees, appellant, among other pleas, filed a plea of *nul tiel* corporation upon which appellees joined issue. It is insisted that the incorporation of appellant could only be proved by introducing in evidence the articles of incorporation of appellant, or a certified copy thereof, and that parol evidence tending to show that appellant was a *de facto* corporation was improperly admitted. It was not necessary under such plea in this case for appellees to show that appellant was a corporation *de jure*, and parol evidence that appellant was known and transacted business as a corporation was proper, and sufficient to meet the plea. Osborn v. The People, 103 Ill. 224; Holt v. Tennent-Stribling Shoe Co., 69 Ill. App. 332; Walker Paint Co. v. Ruggles, 48 Ill. App 406.

It is next urged that the court improperly admitted the evidence of the witness Davy as to the number of cubic yards of material moved by appellees in performing their contract with appellant, because by the terms of the contract, the estimates of the amount of work done by appellees were to be made by the resident engineer of the Chicago & Alton Railroad Company, and such estimates were to be the basis of settlements between the parties. The written proposition and acceptance heretofore quoted, does not so state the contract, and it must be held to incorporate all the terms of the contract between the parties. The evidence was competent, and the weight to be given to it was a question for the jury.

It appears from the evidence that some of the dirt taken by appellees from a cut and which should have been carried by them to a fill was left upon the bank and thus became waste. There is evidence strongly tending to show that as to such waste dirt a settlement was had between the parties whereby the same was estimated at 200 cubic yards and deducted from appellees' pay roll. It is, however, insisted by appellant that no recovery can be had by appellees under the common counts unless it appears that the contract was fully executed and performed by them; that appellees cannot be heard to set up an excuse for the non-performance of the contract in the absence of an averment of such excuse in an appropriate declaration. Conceding this position of appellant to be correct, it manifestly raises the question for the first time on this appeal. Appellant interposed no objection to the evidence introduced on behalf of appellees tending to show an excuse for the non-performance of the contract, nor did it offer any instruction raising the question now urged.

Indeed, the second instruction given by the court at the instance of appellant expressly authorized the jury to allow to it a credit or deduction from the amount

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due appellees for whatever it cost, as shown by the evidence, to put the dirt into the fill.

It is well settled that a party cannot shift his position on appeal and thus secure an advantage by raising a question not raised in the trial court.

A careful examination of the record discloses no error prejudicial to appellant, and the judgment will, therefore, be affirmed.

*Affirmed.*

The motion to tax costs of additional abstract to appellant will be denied.

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#### Joseph Strattman v. John Moore.

*DRAM-SHOP ACT—what proper element of damages in action for loss of support.* In an action brought under the Dram-shop Act by a minor for injury to his means of support by reason of the defendant's having caused or contributed to the habitual intoxication of his father, evidence is proper that such minor was by reason of such intoxication of his father deprived of the necessary school books.

Action under Dram-shop Act for loss of support. Appeal from the Circuit Court of Vermilion county; the Hon. E. R. E. Kimball, Judge, presiding. Heard in this court at the November term, 1906. *Affirmed.* Opinion filed June 1, 1907.

O. M. JONES and BUCKINGHAM & TROUP, for appellant.

MABIN & MORRIS, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee, a minor, suing by his next friend, recovered a verdict and judgment against appellant, a dram-shop keeper, for \$200, for injury to his means of support by reason of the habitual intoxication of C. C. Moore, his father, caused by liquor sold by appellant.

Prior to May, 1904, the family of the said C. C. Moore, a widower, consisted of his daughter, Mary, aged twenty-one years, and his sons Harry and John, aged, respectively, seventeen and thirteen years. At that time Mary left home and thereafter the sons continued to reside with the father.

The evidence tends to show that C. C. Moore was a mechanic, capable of earning \$4 a day, and that when sober he was able and well disposed to provide his family with all the necessary comforts of life; that by reason of his intoxication caused by liquor procured from appellant, his son, John Moore, was deprived of necessary food, wearing apparel and school books; that he seldom, if ever, procured liquor from appellant himself, but the liquor drank by him was procured for him by his two minor sons by his command and at his direction; that his daughter Mary had notified appellant of the habitual intoxication of her father, and that the liquor sold to the sons was purchased by them at the direction of and to be drank by their father, and that he should make no further sales of liquor to them; that thereafter, appellant or his bar tender frequently sold liquor to the sons to be drank by their father.

It is urged that the conduct of John Moore and his brother in procuring liquor from appellant to be drank by their father precludes a recovery in the case. The sons were under the domination and control of their father. What they did in that regard was done under coercion by him, and it cannot be said that they voluntarily contributed to his intoxication. Under such circumstances, the fact that the sons, at the suggestion of their sister, kept a memorandum of the several occasions upon which they so procured liquor from appellant, cannot affect the substantial rights of appellee.

It is insisted that the trial court erred in permitting appellee to show that he had, by the intoxication of his father, been deprived of necessary school books.

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Maplewood Coal Co. v. Graham.

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Under the compulsory school law in force in this state, the father of appellee was bound to cause appellee to attend school, and as elements constituting the necessary support of appellee, the father was as much bound to furnish the school books required by appellee to pursue his studies in school, as he was to furnish appellee with food, clothing and shelter, and a deprivation of his necessary school books by reason of the intoxication of his father was an injury to the means of support of appellee, within the meaning of the statute.

The amount of damages awarded by the jury excludes any inference that exemplary damages were allowed, although the evidence in the record clearly justified such damages.

There is no error in the record and the judgment is affirmed.

*Affirmed.*

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#### **Maplewood Coal Company v. Andrew Graham.**

**CONTRIBUTORY NEGLIGENCE—when not defense.** Contributory negligence is no defense to an action brought under the Mines and Miners Act to recover damages for personal injuries resulting from a wilful violation of such act.

Action in case for personal injuries. Appeal from the Circuit Court of Fulton county; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**MASTERS & MASTERS, for appellant.**

**O. J. BOYER, for appellee.**

MR. JUSTICE BAUME delivered the opinion of the court.

This is an action on the case by appellee against appellant to recover damages for a personal injury

occasioned by an explosion alleged to have been caused through the failure of appellant to have the roadways in the mine regularly and thoroughly sprayed, sprinkled and cleaned. A trial by jury in the Circuit Court of Fulton county resulted in a verdict and judgment against appellant for \$200.

On January 5, 1906, at four o'clock p. m., appellee accompanied by Henry McGee, in the line of their duty as shotfirers, entered the coal mine of appellant for the purpose of firing 350 or 400 shots, which they had inspected earlier in the day. Having fired a large number of shots in the rooms in several entries, they proceeded to the second north entry for the purpose of firing fifteen shots in room Nos. 2, 3, 4, 6 and 7 in that entry. They commenced firing in room No. 7, being the north room, and thence proceeded south firing shots in each of room Nos. 6, 4, 3 and 2 in the order named. After firing the shots in room No. 2, they proceeded south toward the main east entry a distance of 40 feet, when the explosion occurred which caused the injury complained of. It is not controverted that appellee was injured as the result of an explosion, but it is insisted that the explosion was caused solely by the accumulation of smoke and gases occasioned by the improper manner in which shots were fired; that dust, of itself, cannot produce an explosion; that the mine was wet and free from dust, and it was, therefore, impossible that dust particles could have aggravated the explosion, as alleged in the declaration.

It would serve no useful purpose to review in detail the testimony of the large number of witnesses, called on behalf of the respective parties to affirm and deny the presence of dust in the mine, and the failure of appellant to have the roadways sprinkled and cleaned. Suffice it to say that the evidence upon that issue was so close and conflicting as to render the verdict of the jury thereon conclusive in this court. It may be doubted, from the evidence in the case, whether

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the particles of dust which accumulate in a coal mine are capable, independently, of producing such an explosion as occasioned the injury to appellee, but it is admitted by all of the witnesses for appellant that such particles of dust will aggravate an explosion caused by smoke and gases in a coal mine coming in contact with the flame from shots, and we are of opinion that the jury were justified in finding that the explosion in question was aggravated by the presence of such dust, and that the presence of such dust was the proximate cause of the injury. Manifestly, the legislature conceived the presence of dust in a coal mine as liable to produce injurious results in explosions, when it enacted paragraph g of section 20 of the Mines and Miners Act, which reads as follows: "In case the galleries, roadways or entries of any mine are so dry that the air becomes charged with dust, the operator of such mine must have such roadways regularly and thoroughly sprayed, sprinkled, or cleaned, and it shall be the duty of the inspector to see that all possible precautions are taken against the occurrence of explosions which may be occasioned or aggravated by the presence of dust."

It may be that appellee did not follow the most approved method of firing the shots, by firing in the same direction in which the current of air was carried, rather than in a direction against the current of air, but it cannot be contended with any force, that in so doing appellee was guilty of contributory negligence barring a recovery. Contributory negligence by a party injured is no defense to an action based upon the wilful failure of a mine operator to observe the requirements of the statute. Kellyville Coal Co. v. Strine, 217 Ill. 516. And the fact that the method of firing adopted by appellee had a tendency to cause a greater accumulation of gas and smoke at the mouth of the entry does not excuse appellant from the performance of its statutory duty with reference to sprinkling or cleaning its roadway, or absolve it from

liability for an injury resulting from an explosion aggravated by the presence of dust in the mine.

It is insisted that the court erred in permitting the witness Thomas Back, the county mine inspector, to testify on rebuttal as to the dusty condition of the second north entry on December 11, 1905. Several witnesses introduced on behalf of appellant testified that the mine was naturally what is called a "damp mine," and that the second north entry had a "bleeding" or "seeping" roof. In view of this evidence, which related to a permanent condition of the mine, we are of opinion that the testimony of the witness Back tending to show that the second north entry was dry and dusty on December 11, 1905, was competent, and that the objection of appellant that it related to a time too remote, was properly overruled.

We see no serious objection to the evidence introduced on behalf of appellee tending to show that the entire mine was dry and dusty. Proof of the condition of the mine as a whole necessarily related to the condition of its several parts.

Finding no reversible error in the record the judgment will be affirmed.

*Affirmed.*

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#### James H. Gum v. Stephen A. Tibbs.

**CONTRACT**—*when terms of, may be varied by parol.* Where a contract under seal has been fully performed as modified by parol agreement, evidence of such parol agreement is competent.

**Assumpsit.** Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. **Affirmed.** Opinion filed June 1, 1907.

E. L. CHAPIN, for appellant.

TIMOTHY MCGRATH and EDMUND BURKE, for appellee.

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Gum v. Tibbs.

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MR. JUSTICE BAUME delivered the opinion of the court.

September 20, 1901, appellee, as party of the second part, entered into a written contract with appellant acting on behalf of itself and others, parties of the first part, to cut and saw certain timber into lumber. The contract, so far as its terms are here pertinent, provided that the party of the second part should go on the land belonging to the parties of the first part and cut timber of sufficient size and saw up the same into lumber for the term of three years, and have for his compensation two-thirds of such lumber, and that at the time of sawing said lumber, deliver to the parties of the first part one-third of said lumber in stacks on the ground; that the party of the second part should have the use of a certain saw mill on the land putting the same in running order and at the termination of the contract, leave the said mill in as good condition as he received it, natural wear and tear excepted; that the party of the second part should saw said lumber as fast as the parties of the first part might want their share for use or sale, unless prevented by high water or bad weather.

Appellee instituted this suit against appellant to recover the value of certain lumber alleged to have been taken by appellant from the share belonging to appellee, together with the expense incurred by appellee in setting up a new boiler in the saw mill. Upon the trial in the Circuit Court there was a verdict and judgment against appellant for \$356.62.

For a reversal of the judgment appellant urges that the trial court admitted improper evidence on behalf of appellee, and that the verdict is against the manifest weight of the evidence.

Shortly after the contract was entered into appellee claims to have discovered that the boiler in the saw mill was unfit for use. Appellee then notified appellant that he could not do the work under the contract. Appellee claims that appellant in order to induce him

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to proceed under the contract agreed to supply another boiler and to pay him for the labor of setting the same up. Another boiler was procured by appellant and set up by appellee.

It is urged that the trial court erred in permitting appellee to show a parol agreement changing and modifying the terms of the written contract under seal. Unquestionably an executory contract under seal cannot be changed or modified by a parol agreement, but where a contract under seal has been fully executed as modified by a parol agreement, evidence of such parol agreement is competent. *Snow v. Griesheimer*, 220 Ill. 106. The evidence tends to show that the contract here involved was fully executed as modified by the parol agreement, and evidence of such parol agreement was, therefore, competent and properly admitted.

Counsel for appellant, upon the trial, evidently understood the evidence to be competent under the rule stated, as he did not object and except to its admission.

The evidence in the record as to the quantity of lumber sawed by appellee and how much, if any, of his share of the lumber was appropriated by appellant, is in hopeless conflict. We are not prepared to say that the jury did not properly solve the problem submitted to them. The record is free from error and the judgment will be affirmed.

*Affirmed.*

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#### Springfield Consolidated Railway Company v. Isabella Stratton.

*VERDICT—when not disturbed as against the evidence.* A verdict based upon conflicting evidence will not be set aside on review, in the absence of errors of law, unless the same is clearly and palpably against the weight of the evidence.

Action in case for personal injuries. Appeal from the Circuit

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Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

WILSON, WARREN & CHILD, for appellant.

T. J. CONDON and ALBERT SALZENSTEIN, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee recovered a verdict and judgment against appellant for \$1,250, as damages for a personal injury alleged to have resulted from the negligence of appellant in operating its street car.

The only grounds urged for a reversal of the judgment are, that the verdict of the jury is against the manifest weight of the evidence, and that the damages are excessive.

On August 25, 1900, at about 10 o'clock P. M., appellee was a passenger on one of appellant's street cars operated by electricity, on North Grand avenue, in the city of Springfield. The car was an open one, equipped with a foot board which extended along its entire length on each side, so that passengers could pass directly from their seats to the foot board in alighting from the car. It is not controverted that appellee notified the conductor of the car that she desired to get off at Eighth street, which was some distance west of the point where she had boarded the car, and that the car stopped on the west side of said street for the purpose of receiving and discharging passengers.

The only controversy in the case relates to whether, as claimed by appellant, appellee alighted from the car while it was still in motion, or whether, as claimed by appellee, the car had come to a full stop when she attempted to alight, and that while she was in the act of alighting from the north side of the car it suddenly jerked or moved forward causing her to be violently thrown on the brick pavement. Appellee testified that she had several bundles which she was carrying home;

that when the car stopped, she gathered up her bundles and arose from her seat for the purpose of alighting from the car; that immediately after she stepped upon the foot board and as she was about to step upon the pavement, the car suddenly jerked or moved forward, throwing her down. Appellee's version of the manner in which the accident occurred is very clearly corroborated by the testimony of Mrs. Simmons and her son, aged seventeen years, who say they were standing on the northwest corner of the crossing about twelve or fourteen feet from the car, waiting for appellee to alight from the car and walk home with them. The conductor of the car and Edward Shutt, a passenger, testified that appellee attempted to alight and fell while the car was in motion; that the car did not suddenly jerk or move forward, but that it came to a stop slowly and regularly and moved three or four feet after appellee had fallen. The motorman testified that he did not see appellee when she attempted to alight from the car; that the car came to a full stop and after waiting some time for the signal to start he looked around and saw appellee standing in the street; that the car did not come to a stop and then start up and run a few feet and stop again.

In this state of the proof it is manifestly impossible for us to say that the verdict of the jury finding appellant guilty of the negligence alleged in the declaration is against the clear preponderance of the evidence. Counsel for appellant strenuously insist that it is physically impossible that appellee could have been thrown from the car so as to strike the pavement in a sitting position and have the back of her head strike the pavement, if, as she testifies, she was facing west when the car jerked forward suddenly. We see nothing physically impossible in the situation, and cannot assume to say that all persons in falling or being thrown from a street car, under like circumstances, must necessarily strike the ground in precisely the same manner. As a matter of fact, it is very doubtful whether any

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two persons, under such circumstances, would undergo the self-same experience.

The evidence on behalf of appellee, and it is not substantially contradicted, tends to show that prior to the accident appellee was a strong, healthy woman, the mother of ten children, and had never had any serious illness or ailment; that in consequence of the injury she was confined to her bed for nine weeks; that she has since continued to suffer severe pain in her head and in the back of her neck; that she is unable to walk normally and that her condition in that regard is permanent; that she is subject to attacks of fainting; that she is unable to perform her usual and necessary household duties; that as a consequence of her injury she has prolapsus of the womb.

An effort is made on behalf of appellant to show that prolapsus of the womb seldom, if ever, results from a fall, but conceding this to be so, and that appellee, as is insisted, was at the time of the accident in a condition, produced by frequent child-bearing, favorable to the development of that trouble, if the fall, in fact, consummated that condition, it may not improperly be regarded as the proximate cause. We are of opinion that the damages awarded by the jury are not excessive.

The record is free from error and the judgment will be affirmed.

*Affirmed.*

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**Springfield Electric Light & Power Company v. Kate W. Calvert, Administratrix.**

1. **PERSONAL INJURIES**—*what does not absolve co-defendant from liability for.* A defendant in an action for personal injuries is not absolved from liability by reason of the fact that suit was brought against himself and another, which other was found not guilty.

2. **MEASURE OF DAMAGES**—*what element of, in action for death*

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*caused by wrongful act.* In estimating the pecuniary loss resulting to the widow and next of kin of plaintiff's intestate, it is proper for the jury to take into consideration, among other elements, the probable duration of the life of the deceased until terminated by natural causes.

3. DURATION OF LIFE—*what evidence competent to establish.* Standard tables of mortality are admissible for the purpose of enabling the jury to determine the probable duration of life where such question is relevant in the cause.

4. VERDICT—*when excessive.* A verdict of \$7,000 in an action for death caused by alleged wrongful act is excessive where it appears that the plaintiff's intestate was at the time of his death fifty-six years of age and left him surviving a widow and two sons, aged, respectively, twelve and twenty years, the earnings of such intestate being from \$12 to \$15 per week.

Action in case for death caused by alleged wrongful act. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed upon *remitititur.* Opinion filed June 1, 1907.

WILSON, WARREN & CHILD, for appellant.

ALBERT J. SALZENSTEIN and T. J. CONDON, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee recovered a verdict and judgment against appellant in the Circuit Court of Sangamon county for \$7,000, for negligently causing the death of her intestate, Cecil Calvert. The only grounds urged by appellant for a reversal of the judgment, are, that the court admitted improper evidence on behalf of appellee; that the verdict of the jury is against the manifest weight of the evidence, and that the damages are excessive.

In November, 1904, the deceased was one of a crew of men employed by William Drake, a contractor, in removing the metal smoke stacks from a building belonging to appellant. The roof of the building was covered with one-inch boards overlaid with tar paper, and consisted of flat and sloping surfaces. The flat

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surface of the roof was fifteen or eighteen feet wide and fifty or sixty feet long, and from this flat surface the roof sloped on the four sides to a connection with the outer walls of the building. Three weeks or a month prior to the accident, one of the smoke stacks had fallen on the roof of the building and made an irregular hole from two to five feet in diameter through the boards and tar paper on the sloping surface of the roof. This hole was plainly visible to every person on the roof and about the building. There is evidence tending to show that some of the boards on the flat surface of the roof, immediately adjacent to the hole in the sloping surface, were splintered and torn away, and that the tar paper covering the same was intact, presenting a substantially smooth, unbroken surface on the flat portion of the roof.

On the day of the accident while the deceased and his fellow-servant, one Andrew Dippo, were working at a stack on the flat portion of the roof about ten feet from the hole in the sloping surface of the roof, the deceased had occasion to get a rain shutter which was lying on the flat surface of the roof four or five feet from the hole in the sloping surface. Dippo remained at work near the stack preparing a place for the rain shutter to be fitted around the stack so as to shut off the escaping smoke and heat. Dippo, the only person who observed the deceased at or about the time of the accident, testifies that when he first looked up the deceased had hold of the rain shutter; that he then heard a noise and again looked up and saw the top of the deceased's head or hat going down the hole; that the portion of the roof which the deceased fell through was the flat surface, and about two feet from the edge of the slope; that there was no hole apparent in that portion of the roof and that it looked safe and good at that point; that immediately after the deceased fell through the roof, he (Dippo) went to the place and found a hole about two by two and one-half feet in size where the tar paper, which immediately

before the deceased fell appeared to be sound, had sunk or given away. The testimony of the witnesses Fitzpatrick, Stillwater and Samuels, though less explicit than that of Dippo, tends to show that although the flat surface of the roof was covered with the tar paper, some of the boards under it were broken and splintered, and that the hole in the roof which was visible, was in the sloping portion. A careful examination and consideration of the evidence, as it appears in the record, by no means satisfies us that appellee's theory as to the manner in which the deceased came to his death is correct; but we are not prepared to say that the verdict of the jury, sanctioned by the trial judge, is so contrary to the manifest weight of the evidence, as to justify us in setting it aside. The only evidence in the record upon the vital issue of fact involved was introduced on behalf of appellee. Appellant offered no evidence whatever.

The fact that the suit was brought against appellant and William Drake jointly, and that the jury only found appellant guilty, does not absolve appellant from liability. Furthermore, the evidence does not show that Drake had either actual or constructive notice of the alleged defective condition of the roof.

The deceased was on the roof, not as a trespasser, or licensee, but by the implied invitation of appellant, the owner of the premises, and appellant owed to him the duty to exercise reasonable care that there were no latent defects in the roof, whereby he might, while in the exercise of ordinary care for his own safety, be injured.

It being admitted in the record, that the deceased, at the time of his death, was fifty-six years of age and in good health, the trial court, over the objection of appellant, permitted appellee to show the expectancy of life of the deceased, as the same appeared in the mortality tables prepared by Dr. Wigglesworth. In estimating the pecuniary loss resulting to the widow and next of kin of the deceased, it was proper for the jury to take

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into consideration, among other elements, the probable duration of the life of the deceased until terminated by natural causes. *Betting v. Hobbett*, 142 Ill. 72.

While the precise question here involved does not appear to have been determined by any of the courts of review in this state, it has been repeatedly held by courts of last resort in other states, that in actions to recover damages for death by wrongful act, standard tables of mortality are admissible in evidence for the purpose of enabling the jury to determine the probable duration of life of the deceased. *Donaldson v. Miss. etc. R. R. Co.*, 18 Iowa, 280; *Sauter v. N. Y. & H. R. R. Co.*, 66 N. Y. 50; *Duval v. Hunt*, 34 Fla. 85; *Georgia R. & B. Co. v. Oaks*, 52 Ga. 410; *Deisen v. C., St. P., M. & O. Ry. Co.*, 43 Minn. 454; *Steinbrunner v. P. & W. Ry. Co.*, 146 Pa. 504; *G. H. & S. A. Ry. Co. v. Leonard (Texas)*, 29 S. W. Rep. 995; *McKeigue v. Janesville*, 68 Wis. 50. See also note to *U. P. Ry. Co. v. Yates* in 40 L. R. A. 553. In *City of Joliet v. Blower*, 155 Ill. 414, it was held that standard and recognized mortality or life tables, together with computations by experts upon them, are competent testimony, in connection with other evidence, to show the expectancy of life and the present value of a life estate, for the purpose of estimating damages to a remainderman from the change of grade of a street, as well before a jury in an action at law as in equity.

While the mortality tables were by no means conclusive as to the probable duration of the life of the deceased, we think they were properly admitted as some evidence competent to be considered by the jury in determining that question. Appellant did not predicate its objection upon the ground that the Wigglesworth tables were not standard and recognized tables of mortality, and that question is, therefore, not before us.

The deceased was fifty-six years of age at the time of his death and left surviving him a widow and two sons, aged, respectively, twelve and twenty years. His

average earnings were from twelve to fifteen dollars a week. Upon this state of facts we are constrained to hold that the damages awarded appellee are excessive. If, within twenty days, appellee will remit \$2,000 from the amount of her judgment, the judgment will be affirmed for \$5,000, otherwise it will be reversed and the cause remanded.

*Affirmed upon remittitur. Remittitur filed and judgment affirmed.*

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**The North American Accident Insurance Company v.  
James E. Whitesides.**

1. PREMIUM—*what constitutes waiver of payment upon specific date named in policy.* A waiver of the requirement of a policy as to payment upon a day named in the policy is established where it appears that the general agent of the insurer had expressly notified the insured that the provision of the policy requiring the payment of premium on the first day of each month would not be insisted upon and where it further appeared that such agent had uniformly accepted payment of such premiums at any time before the tenth day of the month as a compliance with the terms of the policy.

2. WAIVER—*how question of, determined.* What facts constitute a waiver is a matter of law for the court, but whether the facts existed in any given case is a question of fact to be determined by the jury.

Assumpsit. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CARRINGTON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

JAMES Y. KELLY, for appellant.

S. H. CUMMINS, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee recovered a verdict and judgment against appellant for \$134 alleged to be due by the terms of

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an accident policy as indemnity to appellee for an accidental injury continuing for two months and seven days, at the rate of \$60 per month.

The policy was issued to appellee June 15, 1905, and provided by its terms that it should continue in force only so long as the premium, amounting to \$2, was paid on or before the first day of each month in advance, to the company at its home office in Chicago, or to the person designated in writing by the company to receive the same. It is admitted that the persons designated by appellant to receive the premiums during the time in question, were W. Milburn and Orr & Lewis.

The only controverted questions in the case, are whether or not appellant should be held to have waived the provision in the policy requiring the payment of the premium by appellee on or before the first day of each month, and whether or not appellee paid the premium for the month of December, 1905.

The evidence tends to show that after the policy was issued, appellant's agent, Milburn, told appellee it would be all right if the premiums were paid by the tenth day of each month, and Milburn admits that he did not make remittances to the head office of appellant until the tenth day of each month and that premiums upon policies were generally paid to and received by him at any time after the first, and before the tenth of the month. There is also evidence tending to show that the premiums accruing upon appellee's policy prior to January 1, 1906, were only paid on the first day of the month in two instances, and that they were usually paid at the convenience of appellee, at any time prior to the tenth of the month, and that when paid they were credited as of the first of the month.

On January 6, 1906, the wife of appellee sent her son to the office of the agent of appellant to pay the premium for that month, and the said premium was paid to and received by said agent at about ten o'clock

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in the forenoon. At half past ten or eleven o'clock in the forenoon of the same day, appellee accidentally sustained the injury which occasioned the disability for which he seeks to recover. It is insisted on behalf of appellant that the policy had lapsed because of the non-payment by appellee of the premium for the month of December, 1905, and appellee's failure to pay the premium for the month of January, 1906, on the first day of that month.

The wife of appellee testified that being unable to pay the premium for the month of December she requested Milburn, the agent of appellant, to pay the premium for her and told him she would reimburse him later; that Milburn said he would do so, and subsequently informed her that he had paid the premium for that month. Milburn denies that he had such a conversation with Mrs. Whitesides and denies that he paid the premium for December, but the testimony of Mrs. Whitesides is corroborated by the fact that on January 6th, she sent \$3 by her son to be paid to Milburn, and that Milburn then received that amount and accounted to appellant for only \$2. The premium only amounted to \$2 and the only reasonable inference to be drawn from the transaction, is, that the additional \$1 was paid to and received by Milburn on account of the premium for December which had been advanced by him personally. The receipts offered in evidence by appellee clearly show that premiums were received by appellant and credited to appellee for fourteen months; beginning June 30, 1905, and ending July 31, 1906, and of necessity that must have included the premium for the month of December, 1905. Appellant offered no evidence in explanation of its receipts introduced by appellee.

What facts constitute a waiver is a question of law for the court, but whether the facts exist in any given case is a question of fact to be determined by the jury. *Aetna Life Ins. Co. v. Sanford*, 200 Ill. 126.

"If the practice of the company and its course of

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dealings with the insured and others known to the insured, has been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeiture as against one in whom its conduct has induced such belief." Chicago Life Ins. Co. v. Warner, 80 Ill. 410; Ill. Life Ass'n v. Wells, 200 Ill. 445. In the case at bar the jury were justified in finding that appellant, through its general agent, Milburn, had not only expressly notified appellee that the provision of the policy requiring the payment of premiums on the first day of each month would not be insisted upon, but had almost uniformly accepted the payment of such premiums by appellee at any time before the tenth day of the month, as a compliance with the terms of the policy. Under such circumstances, appellant clearly waived its right to declare the policy forfeited for a failure on the part of appellee to pay the premium on the first day of January, 1906. To hold otherwise, would result in enabling appellant to perpetrate a gross fraud upon appellee.

No instructions were given to the jury at the instance of appellee. It is urged that the court erred in modifying the sixth instruction offered on behalf of appellant. The instruction as asked is conceded to have been improper, and the modification by the court merely harmonized it with the other instructions given which fully informed the jury as to what facts constituted a waiver.

The record is free from error and the judgment is affirmed.

*Affirmed.*

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James E. Whitesides.

This case is controlled by the decision in North American Accident Insurance Co. v. Whitesides, *ante*, p. 290.

Assumpsit. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

JAMES Y. KELLY, for appellant.

S. H. CUMMINS, for appellee.

PER CURIAM. This is a suit by appellee against appellant upon the same accident policy involved in the suit between the same parties submitted to this court on appeal at the November term, 1906, in which an opinion has been this day filed, *ante*, p. 290, affirming the judgment against appellant for \$134. The verdict and judgment against appellant in this case was for \$88, and covered the disability of appellee for a different period.

The questions presented by the records in the two cases are identical, and for the reasons stated in the opinion referred to, the judgment in this case will be affirmed.

*Affirmed.*

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William M. Hinton v. W. Ernest Knott.

1. SERVICE BY PUBLICATION—*who cannot urge insufficiency of.* No other than the party sought to be served by publication can object to the insufficiency of such service.

2. SERVICE BY PUBLICATION—*when objection to sufficiency of, comes too late.* An objection to service by publication comes too late when first made on appeal.

3. FRAUDULENT CONVEYANCE—*what essential to establish.* In

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order to establish a fraudulent conveyance it must appear that both grantor and grantee participated in the fraud.

4. **FRAUD—*how may be established.*** A fraud does not need to be shown by direct and positive evidence; it may be inferred from circumstances, as a conclusive presumption of law, or as a *prima facie* or rebuttal presumption of law, or as an argumentative conclusion of fact.

**Bill in equity.** Appeal from the Circuit Court of Champaign county; the Hon. SOLON PHILIBICK, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**JOSEPH P. GULICK and RAY & DOBBINS**, for appellant.

**G. W. LAWRENCE and SCHNEIDER & SCHNEIDER**, for appellee.

**MR. JUSTICE BAUME** delivered the opinion of the court.

September 15, 1905, a jury impaneled in the Circuit Court of Champaign county returned a verdict in favor of appellee against one Claude Hinton, a minor, and nephew of appellant, for the sum of \$900, in an action of trespass. At that time said Claude Hinton was the owner in fee of the undivided one-third of eighty acres of land in Champaign county, which he had acquired by devise from his grandfather, John H. Funston, two sisters of the said Claude being each the owner of the undivided one-third of said land. September 19, 1905, and before judgment had been entered on said verdict, the said Claude Hinton, by warranty deed, conveyed his interest in said land to appellant for the expressed consideration of \$1,800. Thereafter, judgment was entered on said verdict and execution issued and returned "no property found."

Appellee then filed his bill in equity in the nature of a creditor's bill against appellant and said Claude Hinton to remove said conveyance out of the way of his execution, alleging that said conveyance was fraudulent. The cause was referred to the master, who took

the evidence and reported the same to the court with his conclusions, recommending that the bill be dismissed for want of equity. On the hearing upon the exceptions to the master's report filed by appellee, the chancellor sustained the exceptions and entered a decree in conformity with the prayer of the bill.

It is established by the evidence that on September 19, 1905, Claude Hinton drove from his home in Fisher, a distance of ten or twelve miles, to the home of appellant for the purpose of negotiating a sale of his interest in the land; that upon his arrival there he found appellant about to start for Champaign; that he stated to appellant that he desired to sell his interest in the land and he thought that it would be worth \$2,200, but was willing to take \$2,000; that appellant offered him \$1,800 but said he was unable then to pay the purchase price in cash; that Claude accepted the offer made by appellant and agreed to take the latter's note for the purchase price, payable three years after date with interest at five per cent. with an option to appellant to pay \$1,000 January 1, 1906; that appellant desired to examine the will under which Claude acquired title, and it was arranged that they should meet in Champaign at the office of the attorneys who appeared for Claude in the trespass suit against him, and consummate the transaction; that appellant having examined the will met Claude at the office of his attorneys, where Claude executed a deed to appellant and appellant executed a note for the purchase price; that immediately after the transaction was closed appellant asked Claude what he intended to do with the proceeds of the sale, and Claude then told appellant that appellee had obtained a verdict against him for \$900 and he desired to advise with appellant relative to the propriety of settling with appellee; that appellant told Claude he had better settle with appellee; that Claude, immediately thereafter, went to Indiana, where he has since resided.

It is urged on behalf of appellant that Claude Hin-

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ton, a non-resident defendant and a necessary party to the bill, was not properly before the court because the notice to him by publication was insufficient under the statute. Conceding that the notice was defective, appellant cannot raise that question. Claude Hinton alone can object. *Fergus v. Tinkham*, 38 Ill. 407. Furthermore, the question does not appear to have been raised in the court below.

That Claude Hinton executed the conveyance of his interest in the land to appellant, with a fraudulent design to hinder and delay appellee in the collection of his judgment, can admit of no doubt under the evidence in this record, and we do not understand that appellant seriously insists to the contrary. The mere fact, however, that the conveyance from Claude Hinton to appellant operated to hinder and delay appellee in the collection of his judgment, and that Claude Hinton fraudulently designed to effect that result, is not sufficient to authorize a court of equity to set aside the conveyance. It must also be made to appear that appellant participated in such fraudulent design. *Behrens v. Steidley*, 198 Ill. 303. Whether or not appellant was a party to the fraud, is the vital question in the case.

While the burden is upon appellee to show that appellant participated in such fraudulent design, it is not necessary that such design on the part of appellant be established by direct and positive evidence. It may be inferred from the circumstances, as a conclusive presumption of law, or as a *prima facie* or rebuttal presumption of law, or as an argumentative conclusion of fact. *Hughes v. Noyes*, 171 Ill. 575.

It may well be that proof of any single circumstance would not be sufficient to charge appellant with participation in the alleged fraudulent design, but we are of opinion that taking all the circumstances in evidence as they appear in the record together, the chancellor was not unwarranted in finding that appellant was a party to the alleged fraud. Appellant and

Claude Hinton had not met for more than a year prior to September 19, 1905. Claude was not on friendly terms with his father, and this fact was known to appellant, his uncle. The proposal by Claude to appellant to sell his undivided interest in the land was made hurriedly and was immediately accepted by appellant without any inquiry by him as to the purpose of Claude in selling his interest. Appellant knew that Claude was a minor and that any conveyance by the latter of his interest in land could be repudiated by him upon his arriving at his majority. While the evidence bearing upon the question of the value of the land is conflicting, it supports the finding of the chancellor that the consideration expressed in the deed was inadequate. Appellant was a man of affairs, a dealer in real estate and had sufficient financial ability to have paid the consideration in cash, but he gave his note for the whole amount payable in three years with an option to pay \$1,000 on or before January 1, 1906. The note, when executed, was retained by the attorneys for appellant in this proceeding, and the evidence tends to show that it is still in their possession, although the record discloses a studied and persistent effort to avoid any legitimate inquiry as to its whereabouts.

The decree of the Circuit Court will be affirmed, and the costs of the additional abstract filed by appellee will be taxed against appellant.

*Affirmed.*

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Clarence Ulrey et al. v. J. V. Poe et al.

1. LANDLORD AND TENANT—*character of oil and gas lease.* A lease authorizing exploration for gas and oil confers upon the lessee a title or right merely inchoate until oil or gas is actually found, when the right or title becomes vested.

2. LANDLORD AND TENANT—*when oil and gas lease valid.* An oil and gas lease providing for exploitation or exploration may be

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valid notwithstanding its provisions are to a large extent optional with respect to what the lessees shall do.

3. **LANDLORD AND TENANT—when surrender clause does not destroy mutuality of lease.** Where a valuable consideration has passed from the lessees to the lessor for the covenants contained in a lease and where the covenants of the lease to be performed by the lessees are in part executed, a provision in such lease by which the lessees may, upon the payment of a certain consideration, cancel the lease, does not render the same void for want of mutuality.

Bill in equity. Appeal from the Circuit Court of Clark county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1906. Reversed with directions. Opinion filed June 1, 1907.

GOLDEN, SCHOLFIELD & SCHOLFIELD, for appellants.

H. C. BELL and W. W. SHULER, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a bill in equity by appellees against appellants praying for the forfeiture and cancellation of a certain oil and gas lease. The lease is as follows:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, we, J. V. Poe and wife, of Martinsville Township, Clark County, Illinois, parties of the first part, hereby grant and lease unto Clarence Ulrey, of Martinsville, Illinois, party of the second part, all the oil and gas in and under the following described premises, namely: All that lot of land situated in Martinsville Township, Clark County, Illinois, described as follows, to wit: The southwest quarter of the northeast quarter of Sec. 31, T. 10 N., R. 13, containing 40 acres; also the north one-half of the southeast quarter of the northeast quarter of Sec. 31, T. 10 N., R. 13, containing 20 acres; also the south one-half of the Northeast quarter of the northeast quarter of Sec. 31, T. 10 N., R. 13, containing 20 acres, in three descriptions containing 80 acres, more or less, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas, and to erect and maintain all build-

ings and structures, and lay pipes necessary for the production and transportation of oil and gas.

"To have and to hold the above described premises for the term of five years from the date hereof, and as much longer as oil or gas is found in paying quantities on said premises on the following conditions: Second parties shall within 12 months from date hereof drill to completion a test well upon said premises; if gas is found in sufficient quantities to transport, second parties agree to pay first parties the sum of one hundred dollars per year for the gas product of each well from which gas is transported, payable annually when a market is found for the gas, and first parties to have gas free of cost, to heat and light one dwelling house, to be transported at first parties' cost. If oil be found in paying quantities the first parties shall have the one-eighth part of all oil produced and saved from said premises to be delivered in the pipe line with which second parties connect their wells.

"The parties of the first part grant the further privileges to the parties of the second part the right-of-way over and across said premises to the place of operating, together with the exclusive right to lay pipes to convey oil and gas, the right to remove any machinery or fixtures placed on said premises; and the parties of the first part reserve the right to use and enjoy said premises for the purposes of tillage and all purposes not inconsistent with the objects and purposes above specified.

"The second parties to lay all pipes deep enough in the ground so as not to interfere with the cultivation of the soil.

"The second party hereby agrees to pay any damage done to growing crops by the laying of pipes, and to leave the tilling in as good order as same is found.

"In case no well is completed on said premises within 12 months from this date, the parties of the second part shall pay to parties of the first part as rental at the rate of one dollar per acre per year, to be paid quarterly at the close of the first quarter of each such rental year counting from the expiration of said 12 months.

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“It is further agreed that in case no paying well is completed on said premises within five years from the date hereof this grant shall be null and void, without further agreement of the parties hereto.

“No well shall be drilled within 200 feet of any dwelling house or building without a written permit from the first parties.

“The second parties shall have the right to use sufficient gas and water to run all machinery for operating said wells, also the right to remove all its property at any time; but without interference with first parties' water supply.

“Upon abandonment by second party of the premises, or upon expiration of the rights and privileges of the second parties, under the provisions hereof, the second party agrees to execute full release to parties of first part.

“The parties of the second part hereby agree to complete one test well on this block of leases in Martinsville Township, Clark County, Illinois, on or before the first day of May, 1905, or forfeit all rights under this lease.

“It is understood between the parties to this agreement that all conditions, between the parties hereunto, shall extend to their heirs, executors, administrators and assigns.

“If said first well is found productive of either oil or gas, second parties further agree to continue with due diligence on this block of leases in Martinsville Township as long as paying wells are found.

“It is agreed that upon the payment of one dollar at any time by the parties of the second part, their successors or assigns, to the parties of the first part, their successors or assigns, said parties of the second part, their successors or assigns shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine and this lease shall become absolutely null and void.

“In witness whereof, the parties hereunto have set their hands and seals, this 28th day of January, 1905.

J. V. POE, [SEAL.]

MARY E. POE, [SEAL.]

CLARENCE ULRAY. [SEAL.]”

The bill alleges that the lease was filed for record in the recorder's office of Clark county; that it should be declared void as a cloud upon the title of appellees and should be set aside for want of mutuality and because it is unconscionable; that appellants have not taken possession of the premises thereunder; that no test well has been drilled by appellants upon the premises, and no sufficient test well has been drilled by appellants upon any of the premises designated therein by the words "this block of leases in Martinsville township;" that the said lease is unfair and unilateral, in that it is therein provided that the lessees shall have the right at any time, upon the payment of one dollar to the lessors, to surrender said lease for cancellation.

Appellants answered the bill admitting the execution of the lease and its transfer by Ulrey to The Illinois Oil & Gas Co., and denying that no sufficient test well has been drilled on the premises designated as "this block of leases." Further, the answer alleges that appellants tendered to appellees on April 27, 1906, the rental for the first quarter amounting to twenty dollars, and that the same was refused by appellees; that appellants have tendered to appellees the rentals as they fell due for the delay in drilling a well on the premises described in the lease, but appellees refused to accept the same. Upon the hearing before the chancellor a decree was entered declaring the lease null and void and setting aside and cancelling the same as a cloud upon the title of appellees, and directing appellants to deliver up said lease to be cancelled.

It is admitted by appellants that they have made no attempt to drill a test well on the premises belonging to appellees, described in the lease, and that they are in default as regards their covenant to drill to completion a test well on said premises within twelve months after the date of the lease, but it is insisted that such default has not operated to avoid the lease because they have tendered to appellees the stipulated

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rental provided therein to be paid in the event that no test well was completed within twelve months from January 28, 1905. It is not controverted that appellants did tender to appellees the stipulated rent and that appellees refused to accept the same upon the ground, as stated by them, that "the lease was of no account." If the provision in the lease requiring the payment by appellants of one dollar per acre per year as rental, in the event of their failure to drill a test well to completion on the premises within twelve months, operated to prevent a forfeiture of their rights under the lease in that regard, it must be conceded that the tender and refusal of such rents, was effective to that end. Appellees having refused the tender of the stipulated rent cannot be heard to say that appellants are in default in that regard.

By one clause of the lease appellants agreed to complete one test well "on this block of leases in Martinsville township, Clark county, Illinois," on or before May 1, 1905, or forfeit all rights thereunder. Shortly prior to May 1, 1905, appellants undertook to drill a test well on land belonging to A. P. Keith, located in Martinsville township, south of appellees' land, and ceased their operations on May 1st, claiming to have then drilled a test well to completion. It is impossible satisfactorily to determine from the evidence the depth of the well drilled by appellants on the Keith land, the measurements of appellees' witnesses fixing its depth at 197 feet and those of appellants' witnesses fixing its depth at 295 feet. Whatever the depth of the well, the evidence tends to show that gas was found and that the well was equipped with tubing, casing and a packer; that the packer was put in the well to prevent the gas from escaping, there being no available market therefor. Thereafter, appellants drilled another test well on land belonging to John McNurland located in the same township, about 800 feet from the corner of appellees' land, but struck a flow of salt water, which, it is claimed, so intermingled with the

gas and oil as to destroy the value of the well. The contract of leasing does not specifically designate the lands included in the expression "this block of leases" whereupon appellants agreed to complete one test well on or before May 1, 1905, and if such well was found productive of either oil or gas to continue with due diligence as long as paying wells were found, but it is conceded that the Keith land was embraced within such designation and we think the evidence warrants the conclusion that the land of McNurland was also included within it.

The extent and character of the rights acquired by a lessee under an instrument such as is here involved, have never been passed upon by the court of review in this State, but the uniform holding of courts of last resort in other States, and of the Federal Court, where the question has arisen, is, that the title or right of a lessee is merely inchoate, and for the purpose of exploration only, until oil or gas is actually found, when it becomes vested. *Gadbury v. Gas Co.* (Ind.), 62 L. R. A. 895; *Parish Fork Oil Co. v. Bridgewater Gas Co.*, 51 W. Va. 583; *Ray v. W. P. Natural Gas Co.*, 138 Pa. 576; *Kleppner v. Lemon*, 176 Pa. 502; *Huggins v. Daley*, 99 Fed. 606; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373; *Hawkins v. Pepper*, 117 N. C. 407; *Ohio Oil Co. v. Indiana*, 177 U. S. 190. The vagrant, ambulatory character of the minerals, gas and oil, necessarily distinguish the rights of parties dealing with them from rights acquired with reference to coal, lead, iron and other minerals having a fixed *situs*. In *McKnight v. Gas Co.*, 146 Pa. 185, it was said: "Oil leases must be construed with reference to the known characteristics of the business." In *New American Oil & Mining Co. v. Troyer*, 77 N. E. 739, the Supreme Court of Indiana said: "The peculiar wandering character of gas and oil precludes ownership in their natural state, and hence they are not the subjects of sale and conveyance until they have been reduced to possession and placed under control by

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being diverted from their natural paths into artificial receptacles. In such cases the real subject of the contract is the mining of the gas, or oil, that may be found, on the terms specified. The preliminary exploring is a mere incident that goes for nothing if unsuccessful, and unless oil, or gas, is found in paying quantities, then there is and was not at the inception of the contract, anything to which it could attach. So the title in such contract is at least inchoate until the result of the drilling is ascertained. And if barren territory is developed then there is no lease, no continuing contract, no conveyance of title, because nothing to pass under the agreement. Added to this peculiarity is the custom of making such contracts greatly in advance of the demand for the product, the impracticability of drilling until lines of transportation approach within reasonable reach, the delays, in the beginning of operations, secured by the payment of a small sum, called rent, sometimes justifiable, and sometimes unreasonable, and, merely, for speculative purposes, the possibility, and occasional practice, of extracting the fluids from under lands through wells on the premises of another—the uncertainty of the discovery, the large profits sometimes realized, the heavy expense of drilling the test well, the total loss of labor and expense in case of failure, these and other like considerations have led courts, long before the making of the contract involved in this suit, to place oil and gas contracts, on account of the known characteristics of the business in a class of their own."

There is no pretense in this case that the contract of leasing was procured by the fraud of appellants. The parties were capable of contracting and the contract must be held to express the intention and understanding of the parties, and, in the absence of some inherent infirmity, to be enforceable according to its terms.

Undoubtedly the primary purpose of appellees in executing the contract was to facilitate the exploration

of the premises for oil and gas and to enjoy the stipulated royalties and benefits to accrue to them from producing wells, but manifestly appellees did not contemplate a full realization of the purposes of the contract within any fixed and definite time short of the period of five years. The agreement on the part of appellants to complete a test well on the premises within twelve months from the date of the contract was not absolute, but optional with appellants, and the contract expressly recognizes the optional character of such agreement by providing for the payment by appellants of one dollar per acre per year, as rental for the premises, in the event that no test well was completed within twelve months. In this regard the agreement was upon a valuable consideration, and one which the parties had a perfect right to make.

Appellants having failed to complete a test well on the premises within twelve months, exercised their option to continue the lease by tendering to appellees the stipulated rent. The contract might have been more fair to appellees if it had required appellants to pay the stipulated rent quarterly in advance instead of at the close of the quarter, but such is the contract of the parties, and it comes far short of being unfair in the sense necessary to authorize a court of equity to interfere. At the most, appellees, upon the failure of appellants to pay the stipulated rent at the end of a quarter, could only be deprived of the use of the premises and their right to declare a forfeiture, for the period of three months. This in view of the fact that the territory is as yet largely undeveloped and without any immediate market for the product of the wells, or facilities for its storage or transportation, cannot result in any serious injury to appellees.

The so-called surrender clause in the contract is as follows:

“It is agreed that upon the payment of one dollar at any time by the parties of the second part, their successors or assigns, to the parties of the first part, their successors or assigns, said parties of the second part,

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their successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and terminate and this lease shall become absolutely null and void."

In support of the decree of the Circuit Court it is urged on behalf of appellees that this clause renders the contract of leasing unilateral, and void for want of mutuality; that it creates a tenancy at the will of appellants, and being a tenancy at the will of one of the parties it necessarily becomes a tenancy at the will of both parties, and appellees having elected to terminate the tenancy, the contract was thereby ended.

The position assumed by appellees is not without authority, but the cases so holding, so far as they have come to our attention, are generally to be distinguished from the case at bar, in this, that no valuable consideration passed from the lessee to the lessor for the covenants in the lease, and the covenants to be performed by the lessee were wholly unexecuted. Some of the cases so holding are *Eclipse Oil Co. v. So. Penn. Oil Co.*, 47 W. Va. 34; *Huggins v. Daley*, 99 Fed. 606; *Tennessee Oil Co. v. Brown*, 131 Fed. 696.

In Texas, where the consideration for such a lease was only one dollar and a promise to develop the premises and deliver to the lessor a stated per cent. of the oil produced and it was provided that the lessee might terminate the lease at any time and that the sum paid should be the lessor's compensation, it was held that the contract was unilateral and void. *Roberts v. McFaddin*, 74 S. W. Rep. 105.

In *Lowther Oil Co. v. Guffey*, 52 W. Va. 88, the lease expressed a consideration of one dollar, and the court in distinguishing the case from *Eclipse Oil Co. v. So. Penn. Oil Co.*, *supra*, said: "This lease is very different from the one passed on in the case of *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va. 84. While one dollar is a small consideration yet it is a valuable consideration and the court cannot say that it was

inadequate under the circumstances, as the lessors did not consider it so."

In Lowther v. Miller-Sibley Co., 53 W. Va. 501, where a similar lease was involved, it was said: "But when once a lessee under such a lease begins work, whilst he yet has no vested estate, still he has the right to go on in search of oil, and the lessor cannot then at mere will destroy his right."

In Pennsylvania leases containing similar clauses have been before the court, but it does not appear it has ever been insisted that such a clause operated to nullify such leases.

In New American Oil & Mining Co. v. Troyer (Indiana Sup. Ct.), 77 N. E. 739, where a lease contained a provision as follows: "Second party (lessee) may, at any time, reconvey his grant, and thereupon this instrument shall be null and void," it was held that no estate having vested in the lessee, the surrender clause did not operate to create a tenancy determinable at the will of the lessor.

In Brown v. Fowler (Ohio Sup. Ct.), 63 N. E. 76, a similar lease containing a surrender clause almost identical with the one in the case at bar was under consideration by the court, and it was held that the lease did not create a tenancy at the will of the lessor; that the term of two years was definite and certain and the surrender clause did not operate to destroy the two year term and make it a tenancy at will; that the term of two years and the surrender clause were not inconsistent; that the right to terminate the lease under the surrender clause was a valuable right for which the lessee had paid by paying the \$1 mentioned as the consideration for the whole lease. Further, the court says: "Such options in contracts are sustained by courts. Thayer v. Allison, 109 Ill. 180; Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62. The error of construing a condition subsequent, or an option, as creating the term of the lease, when that has been created by the granting and *habendum*

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clauses, has caused many decisions to be rendered whose soundness may well be doubted. This clause gives the lessee his option, and for which he has paid, to hold the lease to the end of the term, or surrender it sooner. It is always the right of a person holding an option for which he has paid to surrender it before the expiration of the time or to hold it for the full time; but the person who gave the option cannot compel a surrender before the expiration of the full time.

"It is also urged by counsel for defendants in error in both cases that the lease is void for want of mutuality. Granting that the lease was made for the purpose of operating thereon for oil and gas, and that an exclusive right to so operate was granted to the lessee, there is no want of mutuality. The lessee on his part paid \$1, of which the lessor acknowledged receipt, and the lessor on his part made the demise; and because the lessee has performed his part in full, and does not promise to do anything further, it is claimed that there is no mutuality; the claim being that mutuality requires that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other. This is too narrow a definition of mutuality. One party may perform his part in full at the making of the contract, and thereafter have nothing to do or permit to be done, having already done his part, and the other party, in consideration of what has thus been done, binds himself to do or permit to be done something in behalf of the party who has thus fully performed. A promise to perform can be no stronger than performance itself, and, where one party promises to perform his part of a contract and the other performs his part at the making of the contract, both are bound, and there is mutuality. The one who has performed is bound to permit his performance to stand, and the one who has not performed is bound to perform on his part; so that both are mutually bound. Performance on part of one will sustain a promise to perform

on the part of the other. Where there is no performance and no promise to perform on one side, a promise to perform on the other side is without consideration and without mutuality, and such a contract can be held void on either or both grounds. In this lease the lessee paid \$1 for the lease for the exclusive right to operate for oil and gas, and thereby fully performed his side of the contract; and the lessor granted that right under the terms and conditions of the lease, and thereby a contract was made; and the party on one side received the \$1 in full, and the party on the other side received the demise, and then both were mutually bound, and both had to trust to the future for the realization of the purpose for which the lease was made. So that there is no want of mutuality, and in that respect the lease is valid." Upon this question this case is cited with approval in *Venedocia Oil Co. v. Robinson*, 71 Ohio St. 302.

In the case at bar the lease expresses a consideration of \$1 paid by Ulrey to appellees, and as against appellant, The Illinois Oil & Gas Co., assignee of the lease for a valuable consideration, appellees cannot be heard to say that the consideration named was not in fact paid. *Dill v. Fraze* (Indiana Sup. Ct.), 79 N. E. 971.

The covenant in the lease requiring appellants to complete one test well on the block of leases in Martinsville township on or before May 1, 1905, being the only covenant on the part of appellants, a failure to perform which incurs a forfeiture by the express terms of the lease, has been executed by completing a test well on the Keith land, and we find nothing in the record which tends to impeach the good faith of appellants in the performance of that covenant.

The further covenant in the lease requiring appellants, in the event that the first well is found productive of either oil or gas, to continue with due diligence on that block of leases as long as paying wells were found, was evidently attempted to be complied

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with by drilling a test well on the McNurland land, which proved to be abortive owing to the presence of salt water. A breach of this covenant, however, does not involve a forfeiture by the express terms of the lease.

The rule is well settled that forfeitures are not favored in equity and will rarely be enforced, but will yield to the principle of compensation. *Ebert v. Arends*, 190 Ill. 221. The undertaking on the part of appellants to "continue with due diligence on this block of leases in Martinsville township as long as paying wells are found," if in the nature of a condition subsequent, as appellees seem to insist, does not authorize a forfeiture for a failure on the part of appellants to perform, if there was such failure. It is well established that a court of equity will not lend its aid to enforce a forfeiture because of a breach of a condition subsequent. *Douglas v. Ins. Co.*, 127 Ill. 101; *T. St. L. & N. O. R. R. Co. v. R. R. Co.*, 208 Ill. 623. And this is so even where it is sought to remove a cloud on the title. *Douglas v. Ins. Co.*, *supra*.

A careful consideration of the questions involved constrains us to hold that the decree is erroneous and that it should be reversed with directions to the court below to dismiss the bill for want of equity, which is done accordingly.

*Reversed with directions.*

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#### Kellyville Coal Company et al. v. John O'Connell.

1. VARIANCE—*when objection for, comes too late.* A variance cannot be first pointed out on appeal. In order to raise for review a question of variance, it must be specifically pointed out in the trial court.

2. INJURIES TO REAL PROPERTY—*in whom cause of action lies where coal mine is flooded.* Where a mine is operated by a tenant with no obligation on his part to take out all or any certain amount of the coal, and his estate therein is of an uncertain and indefinite character, and the coal is necessarily abandoned or lost,

or the mine cannot be reclaimed, the right of action for substantial damages is in the lessor or owner of the freehold, and the tenant can only recover the amount of expenses incurred by him and the value of the severed coal and personal property lost by him.

3. *DOCTRINE OF ESTOPPEL—when does not apply in conduct of trial.* A statement of counsel is not binding and does not operate as an estoppel where neither the court nor the counsel for the opposite party was misled by such statement.

4. *INSTRUCTION—when, upon right of recovery, improper.* An instruction upon the right of recovery is improper where it omits a necessary element to entitle a recovery.

Action for damages to real property. Appeal from the Circuit Court of Vermilion county; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the May term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

J. B. MANN and H. M. STEELY, for appellants.

REARICK & MEEKS, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee, John O'Connell, brought his action on the case against appellants, the Kellyville Coal Co. and the Chicago & Eastern Illinois R. R. Co., to recover damages occasioned by the alleged negligence of appellants, whereby a coal mine operated by appellee was flooded. There was a verdict and judgment against appellants for \$7,000.

The declaration consists of two counts. The first count alleges that appellee owned and was in possession of a certain coal mine, and the second or additional count alleges that appellee was in possession of and operating said coal mine. Each count of the declaration further alleges that appellee was mining the coal underlying certain described lands in section 32 lying east of Grape creek; that appellant, the Kellyville Coal Co., operated a coal mine known as Kelly's No. 5, situate north and west of the main track of the Chicago & Eastern Illinois Railroad, and that by an arrangement entered into between said coal company

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and said railroad company, and for the mutual advantage of both, a switch was constructed leading from the main line of said railroad just west of appellee's coal shaft up to said mine Kelly's No. 5, a half mile north, and that at a point 150 yards south of the coal shaft of said Kelly's No. 5 said switch crossed the channel of Grape creek; that Grape creek is a natural watercourse, and that appellants constructed a bridge across said creek, consisting of five rows of bents or piling placed in such way that the bents were not in the same line as the flow of the water, but acted as an obstruction to the flow; that the bridge was so carelessly and negligently constructed that by reason thereof the waters were obstructed and diverted from their natural channel down said creek, to the lands lying east of the switch, and that in constructing said switch a channel had been dug along the east side of the railroad grade to the south of said creek, which caused the waters to turn in said channel and flow south over the lands underlying which appellee's mine was situated, where there were two sunken places or depressions in the ground where the roof of the mine had caved in, and negligently permitted the said bridge and said channel to so remain; that on March 25, 1904, the waters flowing down Grape creek became dammed up and obstructed by the bents of said bridge, and were conveyed down the channel along the east side of the railroad grade into the said sink holes or depressions, and were thereby let into the mine of appellee, and continued to flow through said sink holes into the said mine until the same was entirely flooded and filled with water. Said counts of the declaration further allege that by contract appellee had the right to remove all the coal under said lands upon the payment of a royalty of five cents per ton, and that by reason of the flooding thereof the said mine was depreciated in its market value and rendered less valuable; that in order to remove said water, appellee was compelled to and did expend divers large sums of

money amounting to \$10,000 and that by reason of said flooding twenty-five coal cars, twenty tons of steel rails, 500 ties, 4,000 pounds of iron pipe and a large quantity of timbers were lost to appellee. The second count of the declaration further alleges that by reason of the flooding appellee lost the services of divers employes and the services of his mules and horses, and was put to great expense in feeding and taking care of his horses and mules until such time as the mine was again put in condition.

The mine in question, operated by appellee at the time of its flooding, is known as the Bluebird mine, and the right of appellee to mine coal therein accrued by virtue of two certain leases covering different tracts of land. One of said leases expired January 1, 1903, and the other terminated April 1, 1901. Appellee, therefore, on March 25, 1904, was operating said mine merely as a tenant at will or by sufferance, or as a licensee under an alleged parol license after the termination of the leases "to go ahead and take out the coal."

It is insisted that the peremptory instructions tendered on behalf of each of the appellants at the close of the evidence for appellee and again at the close of all the evidence, should have been given to the jury, and this insistence is predicated upon the contention that there was a material variance between the averments of the declaration and the proof respecting the location of the east sink hole with reference to the mine operated by appellee, and the description of the lands under which a portion of the mine was located.

No objection was made to the evidence by appellants in the court below, upon the ground of an alleged variance, nor was any alleged variance between the proofs and the allegations of the declaration pointed out by counsel for appellants. In the absence of such objection in the trial court accompanied by a specific showing as to wherein the alleged variance consisted, so that the same might have been obviated by amendment, the peremptory instructions asked by the appellee

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lants were properly refused, and the propriety of the action of the trial court in that regard is not open to review by this court. Chicago City Ry. Co. v. Carroll, 206 Ill. 318; Alton Railway Co. v. Webb, 219 Ill. 563.

The evidence tends to show that the construction of the grade for the switch track leading from the main track of the Chicago & Eastern Illinois Railroad to the mine known as Kelly's No. 5, was contracted and paid for by the Kellyville Coal Company, and that the Kellyville Coal Company also paid for the construction of the bridge across Grape creek and hauled the necessary timbers therefor, but the evidence further tends to show that engineers in the employ of the C. & E. I. R. R. Co. set the stakes for and indicated the height of the grade, and planned the bridge across Grape creek, and that said bridge was constructed and the necessary ties and rails thereon and upon the grade of the switch track were laid by employes of the C. & E. I. R. R. Co. The evidence further tends to show that after the construction of the switch track from its main track to Kelly's No. 5, the C. & E. I. R. R. Co. operated its engines and cars thereon, and that after the grade was washed out by the flood of March 25, 1904, it was repaired by the employes of said railroad company.

If the bridge across Grape creek was so negligently constructed as to obstruct the natural flow of the water in said creek, and such negligent construction of said bridge, was the proximate cause of the flooding of appellee's mine, and appellee was not, himself, guilty of contributory negligence, we have no doubt but that both of the appellants may be held jointly liable to respond in damages for the resulting injury. These were, upon the evidence in this respect, questions of fact to be solved by the jury.

The evidence tends to show that the water that overflowed the channel of Grape creek and entered the east sink hole flowed first into the workings of the

Commissary mine, thence into the workings of the Brookside mine and thence into appellee's mine, and it is insisted that appellee was guilty of contributory negligence in permitting underground connections to exist between these several mines. The Commissary and Brookside mines seem to have been worked out and abandoned prior to March 25, 1904, and it does not appear that appellee was in anywise responsible for the openings between those mines. Neither does it appear that appellee was responsible for the opening between the underground workings of his mine and the Brookside mine. There is evidence tending to show, however, that the opening between the Brookside mine and appellee's mine had been closed up with brick and cement by appellee.

It is also urged that appellee was guilty of contributory negligence in having failed to fill up the sink holes or depressions through which the water entered his mine. There is evidence tending to show that appellee caused the west sink hole to be at least partially filled up and that he constructed a dam on the upper side of such sink hole to prevent the waters of the creek, in the event of an overflow of its banks, from entering such sink hole.

Upon the trial appellee was permitted to introduce evidence tending to show that by reason of the flooding of the mine he had been obliged to abandon a portion of it; that he thus lost the profits which would accrue to him by mining a certain quantity of coal in the mine; and also appellee was permitted to show as his measure of damages, the difference in the market value of the mine before and after the flooding. The evidence might have been competent if appellee had had such a fixed tenure of the property as would have enabled him to mine the coal in the abandoned portions of the mine, or would have given to his leasehold an appreciable value, but in the case at bar, appellee, as has been said, being merely a tenant at sufferance or a licensee under a parol license, and sub-

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ject at any time to be ousted, or have his license revoked, the evidence was incompetent, as tending to establish damages purely speculative and conjectural, and too remote to be admeasured.

Where a mine is operated by a tenant with no obligation on his part to take out all or any certain amount of the coal and his estate therein is of an uncertain or indefinite character, and the coal is necessarily abandoned or lost, or the mine cannot be reclaimed, the right of action for substantial damages is in the lessor or owner of the freehold, and the tenant can only recover the amount of expenses incurred by him and the value of the severed coal and personal property lost by him. *Bannon v. Mitchell*, 6 Ill. App. 17.

It is urged by appellee that appellants are estopped from questioning the propriety of the action of the court in admitting the evidence referred to and in giving an instruction authorizing the jury to assess damages based upon such evidence, by a certain statement made by counsel for appellants during the trial, relative to the true measure of damages in a case where a tenant had been dispossessed. Counsel for appellants then stated an abstract proposition of law, as he conceived it, and suggested that it might be applicable to the case at bar, but the court expressly disagreed with counsel and refused to entertain his suggestion. Neither the court nor counsel for appellee was misled by the statement of counsel for appellants, and, therefore, the reason for the application of the doctrine of estoppel given in the cases cited by appellee does not exist in the case at bar.

The fourth instruction given at the instance of appellee contains a recital of facts, proof of which are declared to entitle appellee to a verdict, and omits the requisite element of the exercise of due care by appellee for the protection of his mine from flooding. The third instruction offered by appellee and given to the jury as modified by the court is subject to the same criticism.

The fifth instruction given at the request of appellee is in conflict with the directions given to the jury by the twelfth instruction given at the instance of appellants. Such fifth instruction informed the jury that if the sink hole on the west side of the switch was on the land of other parties it would be no defense in the case that appellee might have filled it up; that if appellant, the Kellyville Coal Co., was guilty of the negligence alleged in the declaration it could not require appellee to go upon its lands, or the lands of another, to do something to avoid the effects, if any, of the negligence of appellants, if any.

By the twelfth instruction referred to, the jury were directed that if they believed from the evidence that the sink holes were known by appellee to exist and he had reason to apprehend that his mine might be flooded by means of said sink holes, and that he had neglected to fill up the same, and that such filling up of the sink holes would have prevented the flooding of his mine, and if they further believed from the evidence that the failure of appellee to fill up said sink holes was negligence, and that such negligence contributed to the loss and damage sustained by appellee, he could not recover therefor.

The west sink hole was on the surface of the ground overlying appellant's mine, and it was incumbent upon him to so operate his mine as to do no injury to the surface, and for the purpose of repairing any injury done, he was undoubtedly authorized to go upon the surface. There is evidence tending to show that appellee had been warned by the president of the Kellyville Coal Co., the owner of the land, as to possible danger from a flood and had been directed to fill up the west sink hole, and appellee testifies that he had filled it up, and that he had also constructed a dam on the surface of the ground north of the sink hole. Unquestionably, appellee did not doubt his right to go upon the surface of the land for the purpose of preventing the flooding of his mine.

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The east sink hole was on land overlying the Commissary mine, and there is evidence tending to show that appellee did not know of its existence, or that water entering such sink hole might or could reach the workings in his mine.

By the sixth instruction given at the request of appellee the jury were told that the measure of damages was the difference, if any, in the market value of the mine considering it as it stood immediately before and immediately after the flooding, and by the seventh instruction the jury were authorized to allow appellee as damages such sums of money, if any, as he reasonably expended in putting the mine in substantially as good condition for mining coal as it was before the flooding occurred. By these instructions the jury were, undoubtedly, authorized in the event that appellants were found guilty, to award damages to appellee based upon a consideration of the elements mentioned in both instructions. For the reasons heretofore stated in the discussion of the admissibility of evidence relative to the difference in the market value of the mine, the sixth instruction should have been refused.

Our view of the proper measure of damages in this case is succinctly expressed in the sixth instruction tendered by appellants and refused by the court.

The fifth instruction offered by appellants and refused by the court is not an accurate statement of what constitutes an act of God and was properly refused.

The other questions raised by appellants we do not regard as of sufficient importance to warrant further discussion. For the reasons indicated the judgment is reversed and the cause remanded.

*Reversed and remanded.*

**County of Coles et al. v. Haynes & Lyons et al.**

1. MECHANIC'S LIEN—*what does not affect right to, under section 24 of act.* The right to a lien is not affected by virtue of a contractor associating others with himself in the performance of the work which he undertakes.

2. MECHANIC'S LIEN—*what essential to recover under section 24.* In order to recover under this section of the Mechanic's Lien Act, it is not necessary that the subcontractor shall have had a contract with the contractor; it is sufficient if such subcontractor shall have furnished material to the contractor for the public improvement involved.

3. MECHANIC'S LIEN ACT—*when notice served under section 24 not too late.* A notice served under section 24 of the Mechanic's Lien Act is not too late, notwithstanding all the county orders upon the work had been issued, if such county orders were not valid and did not constitute a payment.

4. MECHANIC'S LIEN ACT—*what sufficient service of notice under section 24. Held,* that the service of notice under section 24 of the Mechanic's Lien Act upon the county clerk and county treasurer of the county in question, was sufficient.

5. MECHANIC'S LIEN ACT—*what does not affect rights of subcontractor under section 24.* The rights of a subcontractor under section 24 are not affected by the fact that he has filed his claim against the estate in bankruptcy of the original contractor and has received dividends upon such claim.

6. MECHANIC'S LIEN ACT—*relation of section 24 to act in entirety.* While the several sections of the Mechanic's Lien Act of 1895 should be construed together insofar as they are applicable to the particular lien asserted, it does not follow that each and every section of the act is applicable and controlling in every case. The steps necessary to be taken to establish a lien under section 24 are prescribed in that section, and the requirements of other sections relating to liens on real estate are not applicable to liens asserted under section 24.

7. APPLICATION OF PAYMENTS—*how made where parties have not determined.* Where the parties have not determined how payments shall be applied, a court of equity will apply payments upon that claim for which no lien exists rather than upon a claim for which the creditor has a lien.

8. INTEREST—*when refusal to allow, not improper.* Refusal to allow interest upon payments due but not made under certain contracts is not improper where the abstract does not contain the contract in question and does not show the due dates of the payments involved.

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County of Coles v. Haynes & Lyons.

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Mechanic's lien proceeding. Appeal from the Circuit Court of Coles county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**EDWARD C. and JAMES W. CRAIG, JR., CRAIG & KINZEL, and JOHN McNUTT, JR.,** for appellants.

**H. A. NEAL and J. H. MARSHALL,** for appellees; **KERTJOHN & KERTJOHN,** of counsel.

MR. JUSTICE BAUME delivered the opinion of the court.

This suit was instituted by Haynes & Lyons, the Marion Brick Works, the Russell & Irwin Manufacturing Company, The Advance Electric Company, Fannie H. Pierce, trading as the Marbelithic Company, the Christopher & Simpson Architectural Iron and Foundry Company, the A. E. Pollhans Clock Company and the Moore-Gabbert Company, appellees, against the County of Coles, S. S. Goehring and R. R. Fuller, to enforce a mechanic's lien against the money due from said County of Coles to said Goehring for the construction and repair of a court house in said Coles county.

Appellants, the First National Bank of Youngstown, Ohio, the First National Bank of Madison, Wisconsin, the National Exchange Bank of Steubenville, Ohio, the Wick National Bank of Youngstown, Ohio, The Dollar Savings & Trust Company, the Central National Bank of Greencastle, Indiana, the Citizens Savings Bank & Trust Company of St. Johnsbury, Vt., and W. R. Patton and E. R. Hutton, executors of the estate of Jacob K. Decker, deceased, having obtained leave therefor, filed their intervening petition in said cause, denying the right of appellees to mechanics' liens, and claiming the fund upon which such liens were asserted. After answer filed by the County of Coles to the bill for mechanics' lien, and the answer of the several lien claimants to the intervening petition,

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the cause was heard by the chancellor and a decree entered enforcing such liens.

The material facts involved are not in controversy, and are substantially as follows:

September 20, 1898, the County of Coles entered into a contract with Samuel S. Goehring for the construction and repair of a court house, for the sum of \$85,727. The contract provided that the work should be completed within one year, and that payment therefor should be made monthly on the basis of 85 per cent. of the value of the labor performed and the materials in place in the building, as estimated by the architect, in interest-bearing county orders, bearing seven per cent. interest per annum, from date thereof, the balance in like interest-bearing county orders upon the completion and acceptance of the building. The evidence tends to show that prior to and at the time of the making of said contract, one Ross R. Fuller had agreed with said Goehring to unite with him in performing said contract, and that on September 29, 1898, said Goehring and Fuller entered into written articles of co-partnership whereby they became equal partners in the performance of said contract.

November 10, 1898, Goehring addressed a communication to the board of supervisors of Coles county, asking that the name of Ross R. Fuller be added to the contract, making the name of the contractors Goehring & Fuller, and that they be allowed to give a good and sufficient joint bond, upon the execution of which the bond given by Goehring be surrendered. This request was denied.

Work under the contract was commenced by Goehring & Fuller, September 29, 1898, and continued until February 15, 1899, when the firm of Goehring & Fuller was dissolved, and thereafter until September 7, 1900, when the work was completed and the building accepted by the board of supervisors, the contract was executed by Fuller as the surviving partner of Goehring & Fuller.

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From time to time, as material was furnished and work performed under the contract, the county orders provided for therein were issued to Goehring and negotiated by Goehring & Fuller, or Ross R. Fuller at par or at a premium to the several intervening petitioners, appellants, and upon the completion of the contract, the balance of such county orders were issued in like manner and negotiated to said appellants. All of the proceeds of the county orders so negotiated to appellants was expended in payment for labor and material under the contract.

The contracts for labor and material of the several appellees claiming liens therefor, were made by them as follows: The Russell & Erwin Manufacturing Company, the Marion Brick Works, the Advance Electric Company and Fannie H. Pierce, trading as the Marbelithic Co., with Goehring & Fuller; the Christopher & Sampson Architectural Iron & Foundry Company, with Samuel S. Goehring, by the name of Goehring & McLean; the Moore-Gabbert Company, as assignee of a contract between the Huff Bros. Lumber & Planing Mill Co., and Goehring & Fuller; Haynes & Lyons and the Pollhans Clock Co., with Ross R. Fuller.

After the completion of the contract for the construction and repair of the court house, Ross R. Fuller was adjudged a bankrupt in the United States District Court for the Southern District of Illinois, and the several lien claimants, appellees herein, except Moore-Gabbert Co., proved their claims against his estate and received final dividends thereon.

The County of Coles having made default in the payment of county orders issued by it under the contract for the construction and repair of the court house, a suit in *assumpsit* was instituted against it in the name of Samuel S. Goehring for the use of the intervening petitioners, to recover the amount due under said contract for work done and material furnished, and on April 12, 1902, judgment was rendered against the county, for \$82,004.62, which judgment

was, on error by the County of Coles, affirmed by the Supreme Court (County of Coles v. Goehring, 209 Ill. 142).

Before the payment to the intervening petitioners by the County of Coles of any part of said judgment, the several lien claimants served written notices on the county clerk and county treasurer of said county, specifying the kind, amount and price of the materials furnished them; that said materials were furnished to the contractor and were used in the construction of the said court house, and the amount due and unpaid to them, respectively.

Appellees predicate their right to a lien upon the provisions of section 24 of the Mechanic's Lien Act of 1895, which is as follows:

"Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor for a public improvement in this state, shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvement: Provided, such person shall before any payment or delivery thereof is made to such contractor, notify the officials of the state, county, township, city or municipality whose duty it is to pay such contractor of his claim by a written notice and the full particulars thereof. It shall be the duty of such official so notified to withhold a sufficient amount to pay such claim until it is admitted or by law established, and thereupon to pay the amount thereof to such person, and such payment shall be a credit on the contract price to be paid to such contractor. Any officer violating the duty hereby imposed upon him shall be liable upon his official bond to the person serving such notice for the damages resulting from such violation, which may be recovered in an action at law in any court of competent jurisdiction. There shall be no preference between the persons serving such notice, but all shall be paid *pro rata* in proportion to the amount due under their respective contracts."

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It is urged that appellees are not entitled to a lien because the contracts under which they furnished material for the improvement were not made with Samuel S. Goehring, the original contractor, but with Goehring & McLean, Goehring & Fuller, and Ross R. Fuller. It is not controverted by appellants that the work was in fact done by Goehring & Fuller and by Ross R. Fuller, as the surviving partner of Goehring & Fuller, and that the material for which liens are claimed was furnished to said parties by appellees and was actually used in the improvement, except as to a portion of the claim of the Marion Brick Works, to which reference is hereafter made. True, the County of Coles refused to accept the joint bond of Goehring & Fuller in lieu of the individual bond of Samuel S. Goehring to whom the contract was awarded, but this action on the part of the county did not operate to prevent Goehring from associating Fuller with him as a partner, in the performance of the work under the contract. Section 23 of the Act of 1895 expressly recognizes the right of an original contractor to associate with him one or more persons as partners or joint contractors in carrying out the contract, and provides that the lien of the subcontractor for material furnished to such contractor and his associates shall continue the same as if the subcontract had been made with all of the parties.

The entire work was done under the contract made with Goehring and the materials furnished by the several lien claimants were furnished in furtherance of that contract and to the person or persons actually engaged in the performance of that contract. We are clearly of the opinion that the firm of Goehring & Fuller, and Ross R. Fuller, as the surviving partner of that firm, were, respectively, the contractors and contractor within the meaning of the statute creating the lien, and that the materials furnished by the several lien claimants to said Goehring & Fuller and Ross R. Fuller, were furnished to the contractor within the meaning of that statute.

It is next insisted that as the notices for liens by the several lien claimants were not served upon the County of Coles until after all of the county orders had been issued to Goehring, no liens attached. The statute authorizing a lien upon the money, bonds or warrants due or to become due to the contractor requires the lien claimant, before any payment or delivery of such money, bonds or warrants is made, to notify the officials whose duty it is to pay such contractor, of his claim by a written notice. If the liens here involved were asserted against valid county orders issued by the County of Coles to the contractor, there would be some force in appellants' insistence, but the county orders so issued were worthless and void as declared by the judgment of the court in County of Coles v. Goehring, *supra*. They did not constitute a payment by the county to the contractor, and no lien could attach against them. In the case cited, plaintiff in error, the County of Coles, set up the fact that appellees here had served notices of liens against the orders, or money due the contractor, and it was said: "So far as the warrants or orders are concerned, the liens can be of no avail, inasmuch as such warrants or orders are here held to have been invalid. This suit is brought for the purpose of determining whether the county is liable to pay to the contractor for the benefit of the usees the money due by the terms of the contract. The filing of the claims for these liens cannot prevent defendant in error from obtaining judgment. A different question may arise when the time comes for the county to pay the money due upon the judgments. These claimants of liens, even if the defendant in error is indebted to them, would obtain nothing if the defendant in error should not be successful in this litigation. In other words, the success of the defendant in error in this litigation is for the benefit of the claimants of liens. The question here is whether the county owes money to the defendant in error, and not whether the county owes

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money to the lien claimants. The latter have no direct claim against the county. Their only claim is a lien upon the money that is to be paid to the defendant in error, and if the amount of the lien claims were deducted from the amount of the judgment, and the claimants should enforce their liens against the money that would be coming to the defendant in error on his judgment, defendant in error would be obliged to pay double the amount of the liens."

If appellees are entitled to liens such liens attached against the money which the county is liable to pay Goehring for the benefit of the usees, appellants here, and the notices of liens having been served before any portion of said money was paid by the county, such notices were in apt time.

The notices were served upon the county clerk and county treasurer, and it is urged that such service was not a compliance with the statute which requires the notice to be served upon the officials whose duty it is to pay the contractor. The contention is that in order to comply with the statute the notices should have been served upon each member of the board of supervisors of Coles county.

By force of the statute the duty of issuing orders for the payment of money due from the county is imposed upon the county clerk, and the duty of paying such orders when issued is imposed upon the county treasurer. We have no doubt but that service of the notices for liens upon these two officials was a full compliance with the statute. Furthermore, the notices were actually brought to the attention of the board of supervisors of Coles county, and were set up by that county in the suit against it by Goehring for the use of the intervening petitioners, appellants here, as establishing liens against the amount of the contract price sought to be recovered.

It is further urged on behalf of appellants that appellees by having their claims allowed as unsecured creditors of the estate of Ross R. Fuller, bankrupt,

relinquished their liens, if they ever had any, and are now estopped from asserting such liens.

Section 1 of the National Bankruptcy Act defines a secured creditor, thus: “‘Secured Creditor’ shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some endorser, surety or other persons secondarily liable for the bankrupt has such security upon the bankrupt’s assets.” Ross R. Fuller had no property right in the money which the County of Coles was held liable to pay to appellants, the intervening petitioners, and the claim, therefore, was not an asset of his estate. Appellees having no security by virtue of a lien upon the property of Fuller; were not secured creditors of his within the meaning of the Act, and they properly filed their claims against his estate, as unsecured creditors.

Appellees were not parties to the negotiation by Goehring of the invalid county orders to appellants, nor is it apparent that appellees did anything which should operate to estop them from asserting their claims to liens. Certainly appellants should not be heard to object that appellees received dividends from the assets of Fuller, in which assets appellants had no possible interest when the dividends so received inured to the benefit of appellants in the reduction, to the extent of such dividends, of the amount of appellees’ claims for liens.

While the several sections of the Mechanic’s Lien Act of 1895 should be construed together in so far as they are applicable to the particular lien asserted, it does not follow that each and every section of the Act is applicable and controlling in every case. The steps necessary to be taken to establish a lien under section 24 here involved, are prescribed in that section, and the requirements of other sections relating to liens on real estate are not applicable to the case at bar. *National Bank of La Crosse v. Petterson*, 200 Ill. 215.

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Section 9 of the Act provides that any two or more persons having liens on the same property may join in bringing suit, setting forth their respective rights in their bill or petition. The several lien claimants, appellees, were properly joined in this proceeding to enforce liens, and the bill is not objectionable as being multifarious.

Of the brick furnished to the contractor by appellee, the Marion Brick Works, 100,000 were not used in the construction and repair of the court house, but were sold by the contractor prior to December, 1899, to one Miller for use elsewhere in the performance of an independent contract.

It is conceded that as to the contract price of brick sold by the contractor to Miller, the Marion Brick Works is not entitled to enforce a lien. It appears, however, that if the payments made by Fuller to the Marion Brick Works be applied upon the price of the brick which were subsequently sold by Fuller to Miller, the balance remaining due to the Marion Brick Works will be for brick which actually went into the construction and repair of the court house. No specific application of the several payments was made by the parties, and in such case a court of equity will apply the payments upon the claim for which no lien exists rather than upon a claim for which the creditor has a lien. *Barbee v. Morris*, 221 Ill. 382.

Objection is made to the claim of appellee, the Moore-Gabbert Co., upon the ground that the contract under which the glass furnished by it, and which was used in the improvement, was not made between it and the contractor, but between the contractor and the Huff Brothers Lumber & Planing Mill Co., which latter company assigned its contract with the contractor to the Moore-Gabbert Co.

The material for which the lien is claimed was furnished by the Moore-Gabbert Co., to the contractor, for use in the court house, and this is all that is necessary to entitle it to a lien under section 24 of the Act.

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The section does not require that the person furnishing the material, and claiming a lien therefor shall have a contract with the contractor, but only that such person shall furnish material to a contractor for a public improvement.

The decree of the Circuit Court finds the amount due the several lien claimants and awards interest thereon at 5 per cent. from May 12, 1906, the date of the decree. Appellees assign cross-errors claiming that they should have been allowed interest on the amount of their respective claims from September 7, 1900, the date of the acceptance of the improvement by the county board of Coles county. This claim on behalf of appellees is predicated upon the statement that the evidence shows all of the contracts for material to have been in writing and, therefore, by virtue of section 2 of the Interest Act, interest should have been allowed. All of the contracts for material entered into by the lien claimants are not before us in the abstract, and such of them as we have discovered in our examination do not fix a time for the payment of the contract price for the material. The court did not err in that regard.

The decree of the Circuit Court will be affirmed.

*Affirmed.*

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**Luella E. Atterbury v. Chicago, Indianapolis & St. Louis Short Line Railway Company.**

1. RAILROAD—*when owner of land has no right of action for injuries resulting from construction of.* Where the right of way of the railroad in question was sold by the owner of the land claimed to have been damaged, no right of action exists for the construction and operation of such railroad.

2. RAILROAD—*when owner of land has right of action for construction and operation of.* Notwithstanding the owner of land may have sold the right of way upon which the railroad in question was constructed and is operated, yet a right of action exists in his favor where the construction or operation is negligent.

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3. AVOIDABLE CONSEQUENCES—*when doctrine of, cannot be invoked.* The doctrine of avoidable consequences cannot be invoked where the person against whom the doctrine is sought to be enforced would have had to become a trespasser in order to avoid the consequences made the basis of the suit.

4. INSTRUCTION—*when invades province of jury.* An instruction invades the province of the jury which singles out one established fact in the case and informs the jury that from that fact alone, as a matter of law, a certain conclusion does not follow.

Action on the case. Appeal from the Circuit Court of Montgomery county; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

LANE & COOPER, for appellant.

GEOERGE B. GILLESPIE, for appellee; L. J. HACKNEY, JETT & KINDER and HAMLIN & GILLESPIE, of counsel.

MR. JUSTICE BAUME delivered the opinion of the court.

This is an action on the case by appellant against appellee to recover damages occasioned to the farm lands of appellant by the alleged improper and negligent construction of a bridge across Shoal creek, the construction of railroad embankment across appellant's lands, and the failure of appellee to provide the necessary culverts and sluice-ways in said embankment, whereby the natural flow of the water in Shoal creek was diverted in a new channel on appellant's lands, and the natural flow of surface water was obstructed. There was a verdict and judgment in the Circuit Court of Montgomery county against appellee for \$500.

February 18, 1903, appellant conveyed to John C. Davie a strip of land 120 feet wide and 2208 feet long running diagonally across the east 80 acres of the 120 acre tract of land then owned by appellant. The recitals in the deed, together with the competent extraneous evidence in the record, clearly show that said strip of land was conveyed by appellant for a railroad

right of way, and in contemplation of the construction and operation by appellee of a railroad thereon.

"When anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass inclusive, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words." C., R. I. & P. Ry. Co. v. Smith, 111 Ill. 363. Where a right of way for a railroad is conveyed by deed it will be conclusively presumed that all damages resulting to the balance of the grantor's land from the proper construction and operation of the railroad were included in the consideration paid therefor. C., R. I. & P. Ry. Co. v. Smith, *supra*; Wylie v. Elwood, 134 Ill. 281; O. & M. Ry. Co. v. Wachter, 123 Ill. 446; A., T. & S. F. Ry. Co. v. Jones, 110 Ill. App. 626.

Among the powers granted to appellee by the railroad general incorporation act, was the following: "To construct its railway across, along or upon any stream of water, watercourse, street, highway, plank road, turnpike or canal, which the route of such railway shall intersect or touch; but such corporation shall restore the stream, watercourse, street, highway, plank road and turnpike thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness and keep such crossings in repair: *Provided*, that in no case shall any railroad company construct a road-bed without first constructing the necessary culverts or sluice-ways as the natural lay of the land requires for the necessary drainage thereof." Hurd's Stat. 1905, 1568.

At a point about 400 feet north of appellant's east 40 acre tract, appellee constructed a bridge, with concrete abutments and piers, across Shoal creek, and from thence, running southwesterly, and diagonally across appellant's west 80 acre tract, appellee constructed an earth embankment, approximately from 80 to 100 feet in width at its base, 18 feet in width at its top and from 20 to 24 feet in height above the

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natural surface of the ground. The bridge across Shoal creek is built diagonally with reference to the flow of the water in the channel, and there is evidence tending to show that the two concrete piers as constructed in the channel of the creek have a tendency to impede the natural flow of the water and deflect its course, and dam it, to the injury of appellant's land. At a point a short distance north of the south line of appellant's west 40 acre tract, appellee has placed under its embankment and at right angles with it, a 60 inch tile. The natural flow of the surface water on appellant's land is southwardly, and it is conceded by appellee that the provision made by it for draining the surface water from the portion of appellant's land lying north of the embankment is wholly insufficient.

Appellee in constructing its railroad had the undoubted right to build a bridge across Shoal creek and to make a necessary embankment upon appellant's land for its road-bed, but in so doing it was bound to restore the creek to its former state, or to such state as not unnecessarily to impair its usefulness, and to construct the necessary culverts or sluice-ways required by the natural lay of the land for the necessary drainage thereof. A failure upon the part of appellee to so construct its bridge, or to provide the necessary culverts and sluice-ways in its embankment for the proper drainage of appellant's land, renders it liable to respond in damages for the injury occasioned to appellant by such failure.

In such case, and in the case at bar, the measure of damages is not the value of the land alleged to be injured by the wrongful or improper construction of the bridge and embankment, but the measure of damages is the rental value of the land.

The damages necessarily resulting to appellant from the construction and operation of appellee's railroad in a reasonably proper and skillful manner, were settled and compensated for by the consideration in the deed for the right-of-way, but damages resulting to

appellant by reason of the negligent or improper construction and operation of appellee's railroad, were manifestly not then contemplated, and are recoverable by appellant, as, and when, they accrue. In such case, the remedy of appellant is in successive recoveries until appellee properly constructs and operates its railroad. *O. & M. Ry. Co. v. Wachter, supra*; *A. T. & S. F. Ry. Co. v. Jones, supra*; *O. & M. Ry. Co. v. Thillman*, 143 Ill. 127.

Over the objection of appellant, appellee was permitted to introduce evidence of a proposal made by employes of appellee to appellant for the purchase of a strip of ground on the north side of and adjacent to, the embankment, to be used by appellee in reinforcing its embankment, and in constructing a ditch to connect with Shoal creek, whereby the surface water, the natural flow of which is obstructed by the embankment, might be drained into said creek. This was error prejudicial to appellant.

In a proper case we recognize the applicability of the doctrine of avoidable consequences, that is, the duty of the party injured by the breach of a contract or tort of another to make reasonable effort to avoid or minimize the damages resulting therefrom, but the case at bar does not admit of the application of that doctrine. Conceding that a ditch, properly constructed along appellee's right of way north of the embankment, would carry the surface water to Shoal creek, it appears that such a ditch cannot be constructed wholly upon appellant's land; that the point at which the creek crosses the right of way and embankment of appellee and where such ditch must necessarily empty into the creek is distant about 800 feet northeast of the northeast corner of appellant's land, and for that distance such ditch must be constructed upon land not belonging to appellant. A ditch constructed upon appellant's land will avail nothing, unless continued to the creek, and appellant cannot be burdened with the construction and maintenance of a ditch not upon her

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land. Appellee cannot invoke the doctrine of avoidable consequences where appellant would be required to become a trespasser. C., R. I. & P. Ry. Co. v. Carey, 90 Ill. 514; C., I. & W. Ry. Co. v. Ward, 120 Ill. App. 212.

The plats and surveys of the lands involved and of the construction work done by appellee, were not improperly admitted in evidence.

What we have heretofore said obviates the necessity of discussing the propriety of the action of the court in refusing certain instructions offered on behalf of appellant. The instructions were properly refused.

We perceive no objection to the first instruction given at the instance of appellee. In substance, it informed the jury that they were bound under their oaths to take the law of the case from the court and to apply it to the facts as found by them. Appellee's third given instruction is open to the objection that it singles out one established fact in the case and informs the jury that, as a matter of law, a certain conclusion does not necessarily follow therefrom. Such instructions merely mislead and confuse the jury. Weston v. Teufel, 213 Ill. 291. Appellee's fourth given instruction states the law applicable to the case with substantial accuracy. Whether appellee constructed its railroad in a proper and reasonably skillful manner was a question of fact for the jury. Appellee's fifth given instruction was not applicable to the case and should have been refused.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

**Darius J. Walters v. Albert Stacey.**

**FENCE**—when liability for injuries resulting from failure to maintain partition, does not exist. Where the owners of adjoining land have agreed that the stock of each might pasture on the land of the other, no action will lie by one against the other for a failure to maintain a partition fence.

**Trespass.** Appeal from the Circuit Court of DeWitt county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**HERRICK & HERRICK**, for appellant.

**ARTHUR F. MILLER and INGHAM & INGHAM**, for appellee.

**MR. JUSTICE BAUME** delivered the opinion of the court.

This is an action in trespass by appellant against appellee to recover damages for the alleged killing of a boar belonging to appellant by a boar in the custody of appellee which is alleged to have escaped by reason of a defect in a partition fence which it was the duty of appellee to have maintained. Upon trial by jury there was a verdict for appellee, and judgment against appellant for costs. An opinion by this court upon a former appeal of the case is reported in 122 Ill. App. 658.

The evidence tends to show that on May 16 or 17, 1903, a Poland China boar belonging to appellant was killed in appellant's enclosure by a Jersey red boar in the possession of appellee, then kept in an adjoining enclosure belonging to appellee, and that the Jersey red boar escaped from appellee's enclosure through a water gate in a partition fence which it was the duty of appellee to keep in repair. It was claimed by appellee upon the trial, and the jury were justified in so finding, that shortly prior to May 16, appellant and appellee had a conversation relative to the condition of their partition fences and water gates, which then

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appeared to have been out of repair; and that it was then mutually agreed between the parties, that owing to the high stage of water in the creek crossed by said water gates and the fact that both parties were then busily engaged in their farm work, neither of them would repair their respective water gates until they had their corn out, and that until the water gates should be so repaired neither would hold the other responsible for any damage occasioned by hogs escaping into each other's enclosure. The question at issue was purely one of fact and upon the evidence in the record, the verdict of the jury upon that issue is decisive against appellant.

It was competent for the parties to have mutually agreed that no partition fence should be maintained between their respective enclosures, and that the stock of each might pasture on the land of the other, and in such case no liability would arise against the one failing to fence. *McGill v. Compton*, 66 Ill. 327. We see no reason therefore, why an agreement, such as is alleged to have been made in this case, should not avail appellee to escape liability for his failure to repair the water gate.

It is urged that the trial court erred in admitting and excluding certain evidence and in giving, refusing and modifying certain instructions. A careful examination of the record discloses no ruling of the court upon the evidence that could have operated to the prejudice of appellant. The evidence offered by appellant in rebuttal was of a character, which it was within the discretion of the court to admit or exclude, and we are not disposed to say that such discretion was abused.

The burden of proving the agreement set up as a defense by appellee, was upon him, and the fourth instruction given at the request of appellant and the fourth instruction given at the instance of appellee, so informed the jury in substance.

The judgment of the Circuit Court will be affirmed.

*Affirmed.*

**B. F. Harrison v. Horace G. Longbrake et al.**

1. **HUSBAND AND WIFE**—when conveyance from former to latter will not be set aside, at instance of creditors. If the equity of the wife is first in time, first in right, and is first consummated by a conveyance vesting her with the legal title, the conveyance will not be set aside at the instance of creditors who have not extended credit upon the faith of the husband's ownership of the land.

2. **DECREE**—when not set aside as against the evidence. Where the evidence in the record is so contradictory as to leave the minds of the judges of the Appellate Court in doubt as to the merits of the controversy, a reversal of the decree, as against the weight of the evidence, will not be ordered.

Bill in equity. Appeal from the Circuit Court of DeWitt county; the Hon. SOLON PHILBICK, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

LEMON & LEMON, for appellant.

EDWARD J. SWEENEY, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a bill in equity in the nature of a creditor's bill filed by appellant to remove an alleged fraudulent conveyance by appellee, Horace G. Longbrake, of certain real estate, out of the way of an execution issued upon a judgment recovered by appellant against said appellee.

After issue joined the cause was referred to the master in chancery to take and report the proofs with his findings. The report of the master was favorable to appellees and recommended that the bill be dismissed for want of equity. The chancellor on the hearing upon appellant's exceptions to the master's report overruled the exceptions and entered a decree in conformity with the recommendation of the master.

The main facts developed by the evidence are substantially as follows: On December 14, 1893, appellant recovered a judgment against Horace G. Long-

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brake for \$697.82, which was revived by *scire facias* June 27, 1904. May 16, 1903, one Charles B. Tenney conveyed to said Longbrake 95 $\frac{3}{4}$  acres of land for the expressed consideration of \$7,331.25, which was paid to said Tenney in cash, the money therefor being realized as follows: \$5,000, from Ruth Dragstrem upon a mortgage loan on the premises, the note and mortgage therefor being executed by said Longbrake and his wife Josephine, and \$2,331.25 from William Dunbar upon a note executed by said Longbrake as principal and by Wiley Marvel and Samuel O. McCullough as sureties, the payment of which latter note was secured to the said sureties by a mortgage on 114 acres of land belonging to Josephine Longbrake. On May 14, 1904, appellees Horace G. and Josephine Longbrake conveyed the 95 $\frac{3}{4}$  acres of land to Charles Longbrake and within a day or two thereafter Charles Longbrake conveyed the same to Josephine Longbrake. There is evidence tending to show that while he did not disclose such agency to Tenney, Horace G. Longbrake negotiated for the purchase of the land as the agent of his wife; that the deed therefor was drafted and executed by Tenney in Bloomington and that the transaction was closed in Clinton; that Tenney assumed that the deed should be made to Horace G. Longbrake as grantee; that when the deed was delivered in Clinton, objection was made to it upon the ground that Josephine Longbrake should have been named as grantee instead of Horace G. Longbrake, and it was then stated that it made no difference as the title could be subsequently passed by a conveyance to Josephine.

There is evidence tending to show that Horace G. Longbrake was, in part, moved to make the conveyance when he did through fear that the judgment obtained against him in favor of appellant might be revived and enforced against the land, but this fact, of itself, could not affect the equities of his wife. The debt for which the judgment was recovered was contracted

long prior to the conveyance of the land by Tenney to Horace G. Longbrake and, therefore, could not have been contracted with reference to the ownership of the land by the debtor, and at the time of the conveyance to Josephine, the judgment in favor of appellant was not a lien upon the land.

To the facts as found by the master in chancery and approved by the chancellor, the rule announced and applied in Behrens v. Steidle, 198 Ill. 303, is clearly applicable: "If the equity of the wife in the land held in the husband's name is first in time, first in right and is first consummated by a conveyance vesting her with the legal title, that title will be sustained."

The evidence in the record is so contradictory as to leave our minds in somewhat of doubt as to the merits of the controversy, but this situation does not justify a reversal of the decree involved. McCormick v. Miller, 102 Ill. 208. We are not prepared to say that the findings of the master in chancery approved by the chancellor are against the clear weight of the evidence, and the decree will, therefore, be affirmed.

*Affirmed.*

The motion of appellees to tax the cost of the additional abstract filed by them will be denied.

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#### Lina E. Sangster v. Lutie K. Hatch.

1. INSTRUCTION—*when invades province of jury.* An instruction which singles out a particular fact not necessarily controlling in the cause and directs a finding as to such fact, invades the province of the jury.

2. INSTRUCTION—*must not indicate that testimony is antagonistic.* An instruction is improper which singles out the testimony of a particular witness as being antagonistic to other testimony.

3. INSTRUCTION—*upon interest of party, erroneous.* Where both of the parties to a cause were witnesses, it is error to single out one of such parties and to direct the attention of the jury to the situation and interest of such party in the result of the suit, without making reference to the situation and interest of the other party to the cause.

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Sangster v. Hatch.

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Action for damages for alienation of affection. Appeal from the Circuit Court of Morgan county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

T. F. SMITH and WILLIAM N. HAIRGROVE, for appellant.

CHARLES A. BARNES and LAYMAN & MORRISSEY, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellant against appellee to recover damages for the alleged alienation by appellee of the affections of the husband of appellant. A trial by jury in the Circuit Court of Morgan county resulted in a verdict of not guilty and judgment against appellant for costs.

Appellant and Seaton W. Sangster were married October 1, 1884, and continued to live together as husband and wife until 1900, when appellant's husband absented himself from her. The evidence on behalf of appellant tends to show that her husband then became captivated with appellee; that he met appellee in Chicago on August 6, 1904, at the Polk street railroad station, and accompanied her on the same train bound for Kansas City; that on August 4, 1904, he and appellee occupied the same apartments in a hotel in Chicago; that on November 4, 1904, he and appellee visited the exposition at St. Louis together; and that on several occasions he called upon appellee at her home in Jacksonville. The evidence on behalf of appellee tends to show that she had no personal acquaintance with the husband of appellant; that she was confined at her home in Jacksonville by illness during the month of August, 1904; and that appellant's charges of intimacy between her husband and appellee were predicated upon mistaken identity.

As the judgment must be reversed and the cause

remanded for error in giving instructions, we refrain from any expression of opinion regarding the weight of the evidence or the merits of the case.

At the instance of appellee the court gave to the jury the following, among other, instructions:

"24. The court further instructs the jury that if the evidence of the defendant and of the witnesses introduced by her show to the jury that it was impossible for said defendant, Mrs. Lutie K. Hatch, to have been at the Windsor-Clifton Hotel in Chicago, or at the Polk street depot in Chicago, or at the Fine Arts Building in St. Louis, at the times claimed by the plaintiff and her witnesses, then the jury should find their verdict for the defendant, Mrs. Hatch.

"25. The court further instructs the jury that if they believe from the evidence that the plaintiff has sworn positively that she saw the defendant, Mrs. Hatch, in Chicago at the Polk street depot on August 6, 1904, and that the defendant has sworn just as positively that she was not there on that date, but was in Jacksonville, Illinois, and if the jury further find from consideration of all the evidence in this case that the testimony of the defendant is entitled to as much credit as that of the plaintiff, and that the same is corroborated to the same extent, then so far as that point is concerned, the jury should find for the defendant, Mrs. Hatch.

"26. The court instructs the jury that while the law makes plaintiff a competent witness in this case, yet the jury have a right to take into consideration her situation and interest in the result of this case, and all the circumstances which surround her, and to give to her testimony such weight and only such weight as in your judgment it is fairly entitled to."

The twenty-fourth instruction is objectionable as being argumentative. Furthermore, it improperly singles out certain occasions involved in the evidence and omits any reference to other occasions, such as the alleged visits by appellant's husband to the home of appellee in Jacksonville.

The twenty-fifth instruction is subject to objection

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in several particulars. It infringes upon the province of the jury. It singles out a particular fact, not necessarily controlling in the case, and directs a finding as to such fact. It singles out the testimony of particular witness as being antagonistic.

The twenty-sixth instruction should not have been given. Appellee, as well as appellant, was a witness in the case, but the instruction identifies appellant and directs the attention of the jury to her situation and interest in the result of the case, without any reference to the situation and interest of appellee in the result of the case. The instruction was calculated to impress the jury with the thought that the court entertained some special reason for discrediting the testimony of appellant, which did not apply to the testimony of appellee. The instruction should have been so drawn as to apply to either party to the suit without designating either. C. & E. I. R. R. Co. v. Burridge, 211 Ill. 9; Taylor v. Crowe, 122 Ill. App. 518.

These instructions could not have been otherwise than prejudicial to appellant, and the judgment will, therefore, be reversed and the cause remanded.

*Reversed and remanded.*

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### The Briquette Fuel Company of St. Louis v. David Davis.

1. CONTRACT—*how to be construed.* A contract is to be construed with due regard to the object and purpose which the parties had in entering into it.

2. CONTRACT—*when cannot be assigned so as to enable assignee to maintain action thereon in his own name.* A contract in writing to pay money conditionally is not so assignable as to enable the assignee to sue thereon in his own name.

**Assumpsit.** Error to the City Court of Litchfield; the Hon. PAUL McWILLIAMS, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

**CREIGHTON & GASSAWAY**, for plaintiff in error.

**J. H. ATTERBURY**, for defendant in error.

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MR. JUSTICE BAUME delivered the opinion of the court.

Plaintiff in error prosecutes this writ of error to reverse a judgment for \$1,620, recovered against it by defendant in error in the City Court of Litchfield, for a balance alleged to be due upon the purchase price of certain personal property.

The contract introduced in evidence, together with the indorsements appearing thereon, upon which the action was based, are, as follows:

“LITCHFIELD, ILLINOIS, July 5, 1902.

“The Litchfield Car Works hereby sells to S. G. Gillespie of Smithboro, Illinois, the engine, boilers, and other connections, railroad tracks, buildings, tools, the buildings belonging to the said Litchfield Car Works situated on ground belonging to the C. C. C. & St. L. Railway.

“The said S. G. Gillespie hereby purchases the above described property and agrees to pay to the said Litchfield Car Works for same the sum of \$1,900. Said payment to be made within sixty days from this date, provided that the Litchfield Car Works shall secure for said Gillespie an assignment of their lease covering said property (belonging to said C. C. C. & St. L. Railway) or secure a new lease directed to said Gillespie covering said property for a term of 20 years at an annual rental of \$100.00.

“It is further agreed that if said lease is secured and said money paid as above set forth, the Litchfield Car Works shall assign to said Gillespie any benefits that may accrue to them on account of a certain later track contract that said corporation has heretofore made with the C. C. C. & St. L. Railway.

LITCHFIELD CAR WORKS,  
D. DAVIS, President.  
S. G. GILLESPIE,  
F. E. BUSH.

“November 14, 1902.

“This contract assigned to David Davis, together with the property therein mentioned.

LITCHFIELD CAR WORKS,  
By D. DAVIS, President.

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"November 14, 1902.

"The interest of S. G. Gillespie in the above contract having ceased and the St. Louis Briquette Fuel Company having purchased the property described in said contract, the said St. Louis Briquette Fuel Company assumes the payment of the balance due on said contract.

F. E. BUSH."

S. G. Gillespie, named as purchaser in the contract of July 5, 1902, was employed by plaintiff in error to find a suitable location and property for its business and the contract was entered into by him for and in behalf of plaintiff in error. This fact was known to the Litchfield Car Works and to defendant in error, its president. The signature of F. E. Bush to the original contract appears affixed thereto by error. Bush was not present when that contract was executed, and the only satisfactory explanation which the record discloses as to how his name appears signed to the contract is, that when he was about to sign the indorsement, or additional contract under date of November 14, 1902, he inadvertently affixed his signature to the original contract following the signature of S. G. Gillespie, supposing the original contract to be the additional contract. Bush was the general manager of plaintiff in error, and his authority to sign the additional contract on behalf of plaintiff in error is not questioned.

At the time the original contract was entered into the Litchfield Car Works had a written license or lease from the C., C., C. & St. L. Ry. Co. for the use of certain premises in the city of Litchfield, for the term of twenty years from March 1, 1898, at an annual rental of \$100. The license provided that it should not be assigned by the licensee without the consent of the licensor indorsed thereon in writing. The following indorsement appears upon the license:

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"LITCHFIELD, ILL., Nov. 22, 1902.

"This lease is assigned to the St. Louis Briquette Fuel Company.

LITCHFIELD CAR WORKS,  
D. DAVIS, Prest."

No consent by the licensor to the assignment is indorsed upon the instrument.

That the interest of plaintiff in error in the property described in the contract was recognized by the Litchfield Car Works and by defendant in error, prior to November 14, 1902, the date of the additional contract, is evident from the fact that on October 11, 1902, the following receipt was given:

"LITCHFIELD, ILL., October 11, 1902.

"Received of F. E. Bush, One Hundred (\$100.00) Dollars to apply on contract of July 5, 1902, with S. G. Gillespie.

LITCHFIELD CAR WORKS,  
D. DAVIS, Prest."

Subsequent to November 14, 1902, plaintiff in error made two other payments upon the contract, one of \$150 and one of \$30, so that at the time suit was instituted there remained unpaid the sum of \$1,620, being the amount of the verdict and judgment.

The case was tried in the court below upon the theory that the additional contract of November 14, 1902, constituted an independent, unconditional undertaking upon the part of plaintiff in error to pay the balance due on the original contract of July 5, 1902; that the proviso in the original contract requiring the Litchfield Car Works to secure to the purchaser of the personal property therein described an assignment of its lease covering the real estate, or to secure a new lease thereof to the purchaser for the term of twenty years at an annual rental of \$100, formed no part of the agreement between the parties. The court, in effect, so instructed the jury. This, we think, was error.

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By the additional contract of November 14, 1902, plaintiff in error, the real party in interest in the original contract, was merely substituted for S. G. Gillespie, the nominal party therein, and the two contracts are to be considered together. Plaintiff in error thereby expressly assumed the payment of the balance due on the original contract, and the original contract must, therefore, be looked to for the purpose of determining the character and extent of the obligation thereby assumed. It was known and understood by the Litchfield Car Works and by defendant in error, when the original and additional contracts were entered into, that the securing of a lease by plaintiff in error of the real estate upon which the property sold was situated, was necessary for the purposes and business of plaintiff in error, and one of the main considerations which moved the agents of plaintiff in error to execute the contracts.

Contracts are to be construed with due regard to the objects and purposes which the parties had in entering into them (*Terra Cotta Lumber Co. v. Owens*, 167 Ill. 360), and so construing the contracts here involved, it was incumbent upon the promisee, before a recovery could be had, to show that the conditions and obligations imposed upon the Litchfield Car Works had been performed and fulfilled, or that plaintiff in error had waived such performance and fulfillment.

While the contract is an instrument in writing for the payment of money, it may well be doubted whether it is assignable so as to entitle defendant in error to maintain an action thereon in his own name. The obligation to pay being not absolute, but conditional, extrinsic proof is necessary to show performance of the condition. In *Potter v. Gronbeck*, 117 Ill. 404, it was held that an instrument depending upon extrinsic proof, before it becomes a binding obligation for the payment of money, is not assignable, under the statute, so as to vest the legal title in the assignee.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

**Chicago & Eastern Illinois Railroad Company v. E. R. Boggs.**

CARRIER—*when liability of, for negligence, is to consignor and not to consignee.* Where a shipment is made to the consignee who has not agreed to accept the same unless the merchandise is up to a certain grade, the right of action for negligence in transporting is in the consignor where the consignee rejects the shipment.

Action on the case. Appeal from the Circuit Court of Moultrie county; the Hon. PAUL McWILLIAMS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**EDEN & MARTIN**, for appellant.

**EDWIN J. MILLER**, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is an action on the case by appellee against appellant to recover damages alleged to have resulted through the negligence of appellant in transporting corn from Kirksville, Illinois, to Nashville, Tennessee. A trial by jury in the Circuit Court of Moultrie county resulted in a verdict and judgment against appellant for \$334.

March 12, 1903, the Big Four Elevator Co., of Mattoon, purchased of appellee one car No. 3, or better, corn at forty cents a bushel, f. o. b. Kirksville, Illinois, Nashville, Tennessee, weights and grades. The car was to be billed to order of appellee, with directions to notify the purchaser at Nashville. March 20th, appellee loaded car No. 2754 of appellant with No. 3 corn for shipment to Nashville and the same was carried by appellant to Mt. Vernon, Illinois, where it arrived March 22nd, and was transferred to the "Y" track to be carried to Nashville by the L. & N. Railroad. Thereafter, the L. & N. Railroad having in-

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spected the car and found it out of repair, switched it, together with an empty car, on appellant's track for the purpose of having the corn reloaded. The corn was then reloaded by appellant in the L. & N. car, and that car switched on the "Y." The L. & N. Railroad then weighed the car, and finding it overloaded refused to carry it and switched it back to appellant's track where a portion of the corn was transferred by appellant to another car belonging to the L. & N. Railroad. On April 3rd the two cars left Mt. Vernon for Nashville, via the L. & N. Railroad, and arrived in Nashville April 8th. About March 30th, appellee not having been advised of the arrival of the corn at Nashville, notified the agent of appellant at Sullivan and was informed that necessary steps would be taken to trace the shipment. The bill of lading for the corn was sent to the Bill-Duff Commission Co., at Nashville, and there is some evidence tending to show that on April 3rd Mr. Bell caused the agent of the L. & N. Railroad to be notified that his company was expecting a shipment of corn from Kirksville in appellant's car No. 2754. However this may be, the evidence tends to show that a few days thereafter Mr. Bell saw two L. & N. cars on the track tagged Big Four Elevator Co., and that he called the attention of an employe of the L. & N. Railroad to the fact and suggested that those cars might contain the corn which was shipped in appellant's car No. 2754, and that he was informed by the employe that the L. & N. Railroad was then tracing said cars. Two or three days thereafter an agent of the L. & N. Railroad notified the commission company that the two cars mentioned contained the corn shipped in appellant's car. Thereupon the commission company, on April 20th, surrendered the bill of lading and the two cars were delivered at the elevator on April 24th. When the cars were unloaded the corn was found to be hot, blue-eyed and swollen and was marked by the inspector "N. E. G.," meaning, no established grade.

Appellee was required to pay freight charges amounting to \$122.74, demurrage amounting to \$16, and charges for insurance and for handling, cleaning and drying the damaged corn, amounting to \$76.54, making a total of \$215.54. The corn sold for thirty cents a bushel, or approximately \$120 less than the contract price.

It is insisted on behalf of appellant that appellee having sold the corn at Kirksville, the right of action for damages, if any, resulting from delay is in the purchaser, and not in appellee. While the question does not appear to have been raised in the trial court, we are clearly of opinion that under the facts of this case the suit was properly brought by appellee. The corn was consigned to the order of appellee and the terms of the sale required that it should grade No. 3, or better, at Nashville.

If the corn did not grade No. 3, or better, at Nashville, the purchaser was not bound to receive it, and the sale was, therefore, a sale upon conditions to be performed at Nashville. The corn having failed to come up to grade at Nashville and the purchaser not asserting any rights under his contract of purchase and bill of lading, which appellee had indorsed and delivered to it, the sale was never consummated, and the right of action for damages against the party responsible therefor is in appellee.

It is further urged that appellee was responsible for overloading the car at Kirksville and for the consequent delay in Mt. Vernon incident to necessarily re-loading the corn. The car as loaded by appellee was received by appellant at Kirksville without objection and no facilities were afforded by appellant at that point to weigh the car. Under the circumstances, we do not think appellant is in a position to shift the responsibility for that delay upon appellee. Furthermore, the length of time consumed by appellant in re-loading the corn at Mt. Vernon, and by its connecting line in carrying it from Mr. Vernon to Nashville, was

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manifestly unreasonable. The corn was in Mt. Vernon from March 22nd to April 3rd, and did not arrive in Nashville until April 8th. It appears from the uncontradicted evidence in the record that the length of time necessary to transport a car from Mt. Vernon to Nashville is one day.

It may be doubted whether the connecting carrier of appellant was responsible for all of the delay that occurred at Nashville after the arrival of the corn and until it was delivered to the commission company, but the evidence justifies the conclusion that it was unable to identify the shipment upon its arrival and that an unreasonable length of time intervened before the commission company was assured that the two cars of the L. & N. Railroad contained the corn which was shipped by appellee.

The evidence tends to show that during the season of the year when the shipment in question was made corn confined in cars from six to ten days will germinate and become heated and damaged, and we are clearly of opinion that the damage resulting to appellee is due to the negligence of appellant and its connecting carrier.

It is urged that the freight and demurrage charges paid by appellee are not proper elements of damage to be recovered by him. Appellee had sold his corn at forty cents a bushel, f. o. b. Kirksville, conditioned upon its grading No. 3, or better, at Nashville. The evidence tends to show that the corn when shipped was of a quality, which, if transported to Nashville without unreasonable delay, would have graded there as No. 3, or better. The purchaser not being bound to receive the corn, because of its damaged condition, appellee was obliged to pay the freight and demurrage charges in order to obtain it and fit it for sale, and was entitled to recover the charges so paid.

The receipts showing the payment by appellee of the freight and demurrage charges, and the certificates

of inspection of the corn, were not improperly admitted in evidence.

There is no substantial error in the record and the judgment will be affirmed.

*Affirmed.*

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**Edward J. Eck v. H. M. Haydon et al.**

1. **HUSBAND AND WIFE—*how conveyance between, viewed where attacked by creditors.*** Where a conveyance from husband to wife is sought to be set aside by the creditors of the former, courts of equity will closely scrutinize the transaction.

2. **PREFERENCE—*right of husband to make, in favor of wife.*** Where the contractual relation of debtor and creditor actually exists between husband and wife, the husband may for a valuable consideration and in good faith prefer his wife to his other creditors.

Bill in equity. Error to the Circuit Court of Moultrie county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

JOHN E. JENNINGS and JOHN G. FRIEDMEYER, for plaintiff in error.

R. M. PEADRO, for defendants in error.

MR. JUSTICE BAUME delivered the opinion of the court.

Plaintiff in error filed his bill in equity in the nature of a creditor's bill to remove an alleged fraudulent conveyance by defendant in error, H. M. Haydon, of certain real estate out of the way of an execution issued upon a judgment by confession for \$880 in favor of plaintiff in error against said defendant in error. Upon the hearing in the Circuit Court of Moultrie county a decree was entered by the chancellor dismissing the bill for want of equity.

The judgment by confession in favor of plaintiff in error was recovered February 29, 1904, upon two notes executed May 6, 1903.

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At the time said notes were given by defendant in error, H. M. Haydon, he was the owner in fee of the undivided one-half of lots 5 and 6, in block 17, of the original town plat of the city of Sullivan, except a strip thirty feet east and west by ten feet north and south out of the northeast corner of said lot 6, also lots 3 and 10 and ten feet off the west side of lots 2 and 11 in block 19 in Canfield's railroad addition to the city of Sullivan. The title to the other undivided one-half of said real estate was in defendant in error, Rosa A. Haydon, the wife of said H. M. Haydon.

H. M. Haydon and Rosa A. Haydon were married October 28, 1900, and the evidence introduced on behalf of defendants in error tends to show that at the time of her marriage, the said Rosa A. Haydon had \$900 in cash and that on the day following her marriage she received from her brother as her share of the estate of her grandmother, together with interest thereon, the sum of \$1,700. The evidence further tends to show that on October 29, 1900, said Rosa A. Haydon loaned to her husband the sum of \$1,600, taking his note therefor; that thereafter she loaned to her husband at various times other sums of money amounting in the aggregate to \$2,000, taking his note therefor; that the consideration for the undivided one-third of lots 5 and 6 in block 17, heretofore described, conveyed to Rosa A. Haydon and H. M. Haydon jointly, was paid by Rosa A. Haydon, and that the consideration of \$600 paid for lots 3 and 10 and portion of lots 2 and 11 in block 19, heretofore described, and which were conveyed to them jointly, was furnished by Rosa A. Haydon.

November 18, 1903, H. M. Haydon and Rosa A., his wife, conveyed by warranty deed to B. B. Haydon, the father of H. M. Haydon, all of the real estate above described and here involved, for the expressed consideration of \$2,000, and upon the same day the said B. B. Haydon conveyed said real estate to Rosa A. Haydon. The evidence in-

troduced on behalf of defendants in error tends to show that upon the execution of the conveyance to her of said real estate, the said Rosa A. Haydon surrendered to her husband the note for \$2,000 she then held against him. A portion of the real estate conveyed was encumbered by a mortgage for \$1,000, and the evidence tends to show that the value of the undivided one-half interest of H. M. Haydon in said real estate was less than \$2,000.

There is no direct evidence in the record contradicting the positive evidence introduced on behalf of defendants in error, relative to the transactions between H. M. Haydon and his wife. The note for \$1,600 above mentioned, alleged to have been given by H. M. Haydon to his wife, October 29, 1900, was offered in evidence, and so far as the record shows, its genuineness as a note given at the time it purports to have been, was not questioned.

The note for \$2,000 alleged to have been surrendered by Rosa A. Haydon to her husband at the time of the conveyance of the real estate to her, is said to have been destroyed and was not, therefore, offered in evidence, but both husband and wife testify that such a note was given and surrendered. That the \$600 paid for the lots in block 19, above described, was paid by Rosa A. Haydon out of her individual funds, is established by proof that she gave her check therefor, which was paid, in the usual course of business, by the bank out of moneys deposited in her name.

True, there are circumstances in evidence which in some degree tend to contradict and impeach the testimony of defendants in error relative to the receipt and accumulation by Rosa A. Haydon of a portion of the money which she claims to have loaned to her husband, but after a careful examination of the record we are not prepared to say they are of sufficient probative force to justify us in setting aside the findings of the chancellor upon the merits of the case.

The intimate relation existing between a husband

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and wife affords a cloak for fraud in their dealings with each other to the prejudice of third parties, which requires a court of equity to scrutinize with suspicion their conduct in that regard, and to demand that the good faith of their transactions be clearly established by the evidence.

Where, however, it appears that the contractual relation of debtor and creditor actually exists between husband and wife, the husband may, for a valuable consideration, and in good faith, prefer his wife to his other creditors. German Ins. Co. v. Bartlett, 188 Ill. 165.

The decree of the Circuit Court will be affirmed.

*Affirmed.*

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#### Thomas Crowe v. Otto Taylor.

1. *Costs—power of court with respect to taxation of.* Costs are purely matters of statutory regulation and they may not be adjudged against a party upon merely equitable or moral grounds. For a like reason, it may be said that where the statute designates and directs a specific item to be taxed as costs and recovered by the successful party to a litigation, courts are not authorized to relieve the unsuccessful party of the payment of such costs upon merely equitable or moral grounds.

2. *Costs—what taxable for transcript of clerk.* Where the clerk makes up the transcript of the record for appeal without using the original bill of exceptions, the costs which are taxable in favor of the successful party are those costs fixed by statute and not the amount which the successful party upon the appeal may have actually paid for the making up of such transcript.

**Trespass.** Error to the Circuit Court of Ford county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**CLOUD & THOMPSON and FRANK LINDLEY,** for plaintiff in error.

**CHARLES M. PEIRCE and SCHNEIDER & SCHNEIDER,** for defendant in error.

MR. JUSTICE BAUME delivered the opinion of the court.

This writ of error is prosecuted to reverse an order of the Circuit Court of Ford county in the matter of the motion by plaintiff in error to retax certain costs in a case in which defendant in error was plaintiff and plaintiff in error was defendant. In an action of trespass in the Circuit Court of Ford county by defendant in error against plaintiff in error there was a verdict for plaintiff in error and judgment against defendant in error for costs, from which judgment defendant in error prayed an appeal to the Appellate Court.

Defendant in error procured from the shorthand reporter of the Circuit Court a typewritten transcript of the shorthand notes of the evidence and paid to such shorthand reporter therefor \$121.50, and also procured from said shorthand reporter a carbon copy of said transcript, for which he paid \$13.50. The clerk of the Circuit Court then taxed as costs in the case the sum of \$135.50, being the total amount of the payments by defendant in error to the shorthand reporter. The original transcript of the shorthand reporter's notes was incorporated in the bill of exceptions, which was filed and remained with the papers in the case in the office of the circuit clerk and the carbon copy was incorporated in the transcript of the record, which was filed in the office of the clerk of the Appellate Court. For his fees in making up the transcript of the record and comparing the copy of the bill of exceptions, the clerk of the Circuit Court taxed as his costs in the case the sum of \$50.75. Upon appeal to the Appellate Court, the judgment of the Circuit Court was reversed and the cause remanded for another trial. In making up a fee bill on appeal, the clerk of the Appellate Court taxed as costs in favor of defendant in error and against plaintiff in error, the unsuccessful party on such appeal, the sum of \$177, being the cost of the transcript furnished by defend-

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ant in error, as computed at fifteen cents for each one hundred words thereof. Plaintiff in error paid the taxable costs in the Appellate Court, including said sum of \$177, and that amount was paid by the clerk of the Appellate Court to defendant in error, as and for the cost of the transcript furnished by him, taxed in pursuance of the statute.

Thereafter, the case was again tried in the Circuit Court of Ford county, where there was a verdict against plaintiff in error for \$125 damages and judgment thereon for that amount, together with costs of suit.

The motion of plaintiff in error to retax costs represents that the sum of \$177 paid by him to the clerk of the Appellate Court, as costs taxed for the transcript of the record filed in said court, are the same costs which are taxed by the clerk of the Circuit Court at \$135, and asks that the clerk of the Circuit Court be directed to retax said item of costs against the defendant in error. Upon the hearing on said motion, the Circuit Court entered an order overruling the motion as to \$121.50 of the \$135 taxed as costs for the original transcript of the evidence, and sustaining the same as to \$13.50, taxed as costs for a copy of the said transcript of evidence.

Section 2 of the act in relation to the appointment of shorthand reporters and prescribing their duties and compensation, so far as it is here pertinent, is, as follows: "Said reporters shall be allowed to charge not to exceed fifteen cents per hundred words for making transcripts of said shorthand notes, to be paid in the first instance by the party on whose behalf such transcript is ordered, and allowed and taxed as costs in the suit, and the transcript when so paid for by the party ordering it and the charges for the same is taxed as costs, the same shall be filed and remain with the papers in the case." Hurd's Stat. 1905, 616.

Section 1 of an act concerning fees and costs on appeal and error provides as follows: "That when-

ever any party to any suit or proceeding in any court of record in this state, desires to take an appeal or prosecute a writ of error from any judgment or decree of such court, rendered in any such suit or proceeding to the Appellate or Supreme Court and shall present to the clerk of such court, where such judgment or decree was rendered, a fair copy of the bill of exceptions or certificate of evidence or other papers not of record in such cause necessary to be transcribed the clerk shall, in making up the transcript of the record for such appeal or writ of error, be allowed three cents for each one hundred words, for comparing such copies with the originals, or with the record thereof, and for correcting any errors in the same; Provided, that in no case shall the fee for such services be less than one dollar; and he shall insert such copy in the record and certify to the same as a part thereof. And in counties of the second and third class, the party furnishing such transcript and who shall be successful on such appeal or writ of error, shall recover as costs against the unsuccessful party, not furnishing such transcript, ten cents for each one hundred words thereof, and in counties of the first class fifteen cents for each one hundred words thereof, together with such other costs as may be allowed by law: Provided, that the parties to such appeal or writ of error may, by agreement, have the original bill of exceptions or certificate of evidence instead of a copy, incorporated in such transcript of the record, without paying or being liable to pay any fees or costs therefor." Hurd's Stat. 1905, 1076.

Costs are purely matters of statutory regulation and may not be adjudged against a party upon merely equitable or moral grounds. Coates v. Hill, 120 Ill. App. 1. For the like reason it may be said that where the statute designates and directs a specific item to be taxed as costs and recovered by the successful party to a litigation, courts are not authorized to relieve the unsuccessful party of the payment of such costs upon merely equitable or moral grounds.

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The apparent difficulty in this case arises from a failure to distinguish between the costs of the original transcript of the evidence by the shorthand reporter which is incorporated in the bill of exceptions signed by the trial judge and filed with the clerk of the Circuit Court, to remain with the papers in the case, and the cost of the copy of such transcript which is incorporated in the transcript of the record by the clerk of the Circuit Court and filed with the clerk of the Appellate Court.

The cost of the original transcript of the evidence filed with the circuit clerk, and to be taxed by him, is the compensation of the shorthand reporter for transcribing his stenographic notes, for which service he is entitled to charge not to exceed fifteen cents per one hundred words.

If the parties agree that the original transcript of the evidence shall be incorporated in the record to be filed in the Appellate Court, the statute provides that the same may be done without paying or being liable to pay any fees or costs therefor, but in the absence of such agreement the appellant or plaintiff in error is required to furnish a copy of such original transcript for that purpose, and for the transcript so furnished, the party furnishing the same, if successful on his appeal or writ of error, is entitled to recover against the unsuccessful party, in counties of the first class, fifteen cents for each one hundred words thereof. It will be observed that the cost to the successful party furnishing such copy, of the copy furnished, bears no relation to the taxable cost therefor in the Circuit Court. The statute does not say that the successful party shall recover as costs the amount paid by him for the copy furnished, but the amount he is entitled to recover is definitely fixed at fifteen cents for each one hundred words in counties of the first class.

The cost of the original transcript filed in the Circuit Court, as well as the cost of the copy filed in the Appellate Court, as fixed by statute, is to be taxed

by the clerk of the Circuit Court. The shorthand reporter's charge for the original transcript in the case at bar, was \$121.50, and the clerk of the Circuit Court was not authorized to tax a greater amount as costs. That, however, is a separate and distinct item of cost, from the item of cost for the copy of the transcript filed in the Appellate Court.

The fact that defendant in error paid only \$13.50 for the copy of the transcript filed in the Appellate Court cannot affect his right to recover its cost as fixed by statute. If he had personally made the copy, expending nothing but his own time and labor, he would still be entitled to recover its cost as taxed at fifteen cents for each one hundred words, in pursuance of the statute.

The order of the Circuit Court was right and will be affirmed.

*Affirmed.*

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#### Mary J. Loftus v. John Loftus.

1. HABITUAL DRUNKENNESS—*when evidence as to, incompetent.* In a divorce proceeding where the charge is habitual drunkenness, evidence of the sobriety of the defendant after the period upon which the charge is predicated is incompetent.

2. REBUTTAL—*when exclusion of evidence offered upon, erroneous.* It is error to refuse to permit the complainant to rebut affirmative evidence offered by the defendant.

3. DIVORCE—*what not wilful desertion.* It is not wilful desertion for a husband to leave his wife and to absent himself from her, where she has given her consent.

4. DIVORCE—*what does not justify desertion.* Desertion is not justified by treatment which interferes with and disturbs the peace and quiet of the party charged with the desertion.

Divorce. Error to the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

JOHN J. REA, for plaintiff in error.

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**F. M. and H. I. GREEN, for defendant in error.**

MR. JUSTICE BAUME delivered the opinion of the court.

Plaintiff in error filed her bill for divorce, charging defendant in error with wilful desertion, without any reasonable cause, for the space of two years from July 4, 1903, and with habitual drunkenness for the space of two years prior thereto. A trial by jury resulted in a verdict in favor of defendant in error upon both issues, and thereupon the bill of plaintiff in error was dismissed by the court for want of equity.

The application of plaintiff in error for an allowance of temporary alimony and suit money was addressed to the sound judicial discretion of the chancellor, and we are not prepared to say that in this case the chancellor abused such discretion in denying the application.

It is urged by counsel for plaintiff in error that he was unduly restricted by the court in the direct examination of witnesses for plaintiff in error and in the cross-examination of witnesses for defendant in error, but our attention is not specifically directed to any interrogatories as to which it is claimed objections were improperly sustained. An examination, however, of the record does not disclose that plaintiff in error was prejudiced by the rulings of the court referred to.

Over the objection of plaintiff in error certain witnesses called on behalf of defendant in error were permitted to testify respecting the habits of defendant in error for sobriety after July 4, 1903, and while he was living separate and apart from plaintiff. Upon that branch of the case the issue, under the pleadings, was, whether or not defendant in error had been guilty of habitual drunkenness for the space of two years next preceding July 4, 1903, and evidence, therefore, that defendant in error was not an habitual drunkard after the date was incompetent and improperly admitted.

As tending to show that defendant in error did not desert plaintiff in error without reasonable cause, defendant in error and one or more witnesses called on his behalf testified to having seen plaintiff in error strike defendant in error and having heard plaintiff in error tell defendant in error to go away and leave her and to stay away. The specific instances related by these witnesses were not the subject of inquiry prior to their examination, and were not referred to by any of the witnesses who testified on behalf of plaintiff in error.

At the close of the evidence on behalf of defendant in error, certain witnesses called on behalf of plaintiff in error were interrogated by her counsel with reference to the specific occurrences mentioned, for the purpose of contradiction or explanation, but upon the objection of defendant in error they were not permitted to testify. This was error. Permitting a plaintiff to introduce evidence of an affirmative matter in rebuttal, where such evidence might properly have been offered in chief, is largely discretionary with the trial court, but where a defendant introduces evidence of an affirmative matter in defense or justification, the plaintiff, as a matter of right, is entitled to introduce evidence in rebuttal as to such affirmative matter. Erie City Iron Works v. Dempsey, 77 Ill. App. 667.

If defendant in error left the home in Champaign, at the request or direction of plaintiff in error, or with her consent, and has since absented himself therefrom with her consent, he cannot be charged with wilful desertion within the meaning of the statute. On the other hand, proof merely of such treatment of him by her as interfered with or disturbed his peace and quiet would not justify him in abandoning her and persisting in such abandonment.

The fourth instruction given at the request of defendant in error, in so far as it states a contrary doctrine, is erroneous.

An examination of the other instructions complained

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of as having been improperly given and refused, does not disclose that the trial court committed any error in that regard.

For the errors indicated, the decree is reversed and the cause remanded.

*Reversed and remanded.*

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**M. F. Keegan v. Joshua Harlan.**

1. PERSONAL PROPERTY—*how value of, may be proved.* In an action to recover the value of personal property, proof of the value of the various articles in question may be made in gross.

2. MEASURE OF DAMAGES—*when profits constitute proper part of.* In an action for wrongfully levying a distress warrant which resulted in the complete destruction of a going business, loss of profits constitute a proper element of the damages recoverable.

3. DISTRESS WARRANT—*when punitive damages for illegal levy of, may be awarded.* If the circumstances justify, it is proper to award punitive damages for an illegal levy of a distress warrant.

TRESPASS. Appeal from the Circuit Court of Vermilion county; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

J. B. MANN, for appellant.

CHARLES G. TAYLOR and JOHN F. LAWRENCE, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit in trespass by appellee against appellant to recover damages for wrongfully levying a distress warrant. There have been two trials of the case, the first resulting in a verdict against appellant for \$800, in which a new trial was granted, and the last resulting in a verdict against appellant for \$1,000, a *remititur* by appellee of \$500 and judgment against appellant for \$500 damages and costs of suit.

Appellant was the owner of two store rooms in the city of Danville, which he claims to have rented to appellee on November 10, 1904, for \$25 a month, \$10 a month for the smaller room and \$15 a month for the larger room. Appellee claims that he did not rent the smaller room of appellant, but that on November 7, 1904, he bought out one Compton, who was conducting a meat business in that room, under a lease from appellant which expired December 1st; that he took possession of the room and paid to Compton the balance for the rent of the room up to December 1st; that on November 15, 1904, he leased the larger room from appellant paying therefor \$15 as rent in advance for one month, and that on the same day he vacated the smaller room and moved into the larger room. On December 14, 1904, appellant issued a distress warrant for the sum of \$25, for rent claimed to be due to him from appellee, and delivered it to a constable to execute. The constable testifies that appellant then told him to go to the store of appellee and get the money, and in case the money was not paid, to close the store. The constable went immediately to the store of appellee for the purpose of executing the warrant, and demanded of appellee the sum of \$25 as rent, whereupon, he was informed by appellee that he (appellee) was not occupying the smaller room and owed no rent therefor; that the rent for the larger room would not become due until the following day, November 15th, and would then be paid. There is a sharp conflict in the evidence regarding what then took place, but we think the jury were justified in finding that the constable directed appellee to sell no more goods, and ordered appellee and some of his customers then in the store to leave the premises, and locked the door, taking possession of the premises and the stock of groceries, meats and store fixtures therein. On November 15th, the constable caused an inventory to be made of the stock and fixtures and thereafter such of the stock as was perishable, was sold. Since the levy

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of the distress warrant, appellant has had the exclusive possession of the store room, stock of goods and fixtures, and appellee has had no access thereto.

At a trial of the issues under the distress warrant there was a verdict for appellee, and judgment against appellant for costs.

There was no impropriety in permitting appellee to state the value of the property in gross. We know of no rule requiring a plaintiff, in the first instance, to fix a value on each article of personal property involved, separately. If the value as fixed in gross is conceived to be exaggerated or incorrect, it can be readily ascertained by a cross-examination of the witness, such as was conducted by counsel for appellant in the case at bar.

For the purpose of enabling the jury to determine the amount of damages sustained by appellee, he was permitted, over the objection of appellant, to testify to the amount of profits realized from his business carried on in the store during the month preceding the levy of the distress warrant.

Appellee was entitled to recover damages for all the injury he sustained as the necessary and natural consequence of the wrongful act of appellant. The business which appellee had established and was conducting at the time of the levy of the distress warrant was totally destroyed by the wrongful act of appellant, and appellee is entitled to recover the damages thereby accruing to him. It was held in Chapman v. Kirby, 49 Ill. 211, that the profits of an established business, and of which a person is deprived by the wrongful act of another, is a proper element of damage, and it was further held that for the purpose of establishing the amount of such damage it was competent to show the profits of the business for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show, that by depression in trade, or other causes, the profits would have been less. We are of opinion that the objection

of appellant to the admission of the evidence was properly overruled.

If the facts detailed by the witnesses for appellee are true, the jury were warranted in assessing punitive damages against appellant and we are not disposed to hold that the damages awarded by the judgment of the court are so excessive as to justify a reversal, or require a further *remittitur*.

Two instructions given at the instance of appellee state mere abstract propositions of law. While the instructions had better have been refused, or so modified as to make them concretely applicable to the facts disclosed by the evidence in the case, we cannot say that giving the instructions as tendered was prejudicial error.

The judgment of the Circuit Court will be affirmed.

*Affirmed.*

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#### City of Farmington v. Mattie Wallace.

1. INSTRUCTION—*when estoppel to complain arises.* A party cannot complain of the submission to the jury of a particular issue where by his own instructions tendered he has requested the court to submit such issue to the jury.

2. INSTRUCTION—*when giving of, containing abstract proposition of law, will not reverse.* The giving of an instruction containing an abstract proposition of law, not concretely applied to the case, will not reverse in the absence of a showing of prejudice resulting.

3. SIDEWALK—*duty of municipality with respect to.* A municipality is bound to know that a particular walk within its territorial limits is constructed of lumber and that the material of which it is constructed is likely to become decayed, and, having such knowledge, it is burdened with the duty of exercising reasonable care by inspection to see that the sidewalk is in a reasonably safe condition for travel.

Action in case for personal injuries. Appeal from the Circuit Court of Fulton county; the Hon. R. J. GRIER, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

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City of Farmington v. Wallace.

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**A. A. LUCKEY and MASTERS & MASTERS, for appellant.**

**CHIPEFIELD & CHIPEFIELD, for appellees.**

**MR. JUSTICE BAUME** delivered the opinion of the court.

This is an action on the case by appellee against appellant to recover damages for a personal injury resulting from a fall on an alleged defective sidewalk. There was a verdict and judgment in the court below against appellant for \$1,000. In answer to three special interrogatories propounded by appellant the jury found that the sidewalk in question was out of repair at the time of the alleged accident; that it had been so out of repair for three months prior to the accident and that appellant had constructive notice of the defective condition of the walk.

On the afternoon of November 22, 1903, appellee, accompanied by her sister, was walking on a board sidewalk on the south side of East Fort street near its intersection with Poplar street in the city of Farmington, when she was tripped by a loose board, upon one end of which her sister, who was slightly in advance, had stepped, causing it to rise up. Appellee fell upon the walk and sustained a fracture of the wrist of her right hand, resulting in ankylosis of the wrist and fingers.

The evidence bearing upon the issues of fact involved, while conflicting, amply sustains the verdict of the jury.

The only questions of law involved to which our attention is directed relate to the action of the trial court in giving and refusing certain instructions.

There is no merit in appellant's criticisms on the second instruction given at the instance of appellee. While there is no evidence tending to show actual notice to appellant of the defective condition of the sidewalk, appellant is not in a position to complain of the submission of that question to the jury, because by the

fourth instruction given at its request, it tendered the same issue to the jury. The instruction does not assume that appellee was in the exercise of due care and caution for her own safety, but expressly requires proof of that as of other facts necessary to entitle appellee to recover. The instruction requires appellee to show that she was "in the exercise of that degree of care and caution which might reasonably be expected from an ordinarily prudent and cautious person under the *circumstances surrounding her* at the time," and this by necessary implication, if not by express reference, includes actual knowledge by appellee of the defective condition of the walk, as an element to be considered in determining whether or not she was in the exercise of due care and caution for her own safety. The fourth instruction given at the instance of appellant is even less specific in that particular, and only requires proof that appellee "at the time was in the exercise of ordinary care and caution."

The third instruction offered by appellee and given by the court, when taken in connection with all of the instructions given, could not have misled the jury, and is not objectionable as limiting the exercise of due care by appellee to the exact time of the injury.

The fourth instruction given at the request of appellee, is as follows:

"The jury are instructed that it is the duty of the defendant city, to exercise reasonable care in inspecting its sidewalks in order that the same may be kept in a reasonably safe condition for use, and in determining from the evidence, whether the defendant exercised reasonable care and diligence to keep the sidewalk in controversy at the point where the alleged injury to the plaintiff was received, in a reasonably safe condition for use, the jury have the right to take into consideration, if the same is disclosed by the evidence, the material of which the sidewalk was constructed, the manner of construction of said sidewalk with reference to decay, and the probable need of re-

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pair thereto, if any such is shown by the evidence, and if, after considering all the evidence in the case, the jury believe from a preponderance thereof, that the defendant city failed to exercise reasonable care and caution in keeping said sidewalk in a reasonably safe condition for use, and that the defendant knew, or by the exercise of reasonable diligence, it might have known, that said sidewalk was out of repair and in an unsafe condition, and that the plaintiff, while passing along the same, and while she was in the exercise of due care and caution for her own safety, as explained in these instructions, tripped and fell on said sidewalk, as alleged in her declaration, and was injured, then the jury would be authorized in finding the defendant guilty, and in assessing the damages of the plaintiff at such sum as from all the evidence will compensate her for the injuries which she has received by means thereof."

It is urged against this instruction that it is argumentative, and that it singles out and gives undue prominence to particular portions of the evidence. While the instruction is not a model and should have been refused, we are unable to say, in view of the evidence in the record, that it operated to the prejudice of appellant. There was evidence strongly tending to show that for several months prior to the accident the boards of which the sidewalk was constructed were loose and that the stringers were decayed, and that these conditions were open and obvious. Appellant was bound to know that the walk was constructed of lumber and that the material of which it was constructed was liable to become decayed, and having such knowledge it was burdened with the duty of exercising reasonable care by inspection to see that the sidewalk was in a reasonably safe condition for travel. As was said in *City of Rock Island v. Starkey*, 189 Ill. 515: "In determining the question of the care of the city in inspecting the sidewalk and keeping it in reasonably safe condition, the jury might properly consider the material of which it was constructed and

the manner of construction with reference to decay and probable need of repairs."

The fifth instruction given at the instance of appellant states a mere abstract proposition of law, and for that reason might better have been refused, but we are not disposed to hold in this case, that the giving of the instruction constituted reversible error.

Appellant tendered to the court thirty-one instructions, of which the court gave fourteen and refused seventeen. There is nothing in the case demanding the preparation and submission to a trial court of such a large number of instructions. The questions of law involved are simple and well settled and might well have been presented to the jury in six instructions. The instructions given by the court on behalf of appellant embodied all the law of the case which it was entitled to have presented to the jury, and there was no error in the refusal of those not given.

The judgment stands for substantial justice and will be affirmed.

*Affirmed.*

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#### Walter L. Caruthers v. E. H. Reesor.

1. FINDING OF COURT—*when not disturbed as against the evidence.* The finding of the court will not be disturbed where the evidence is in sharp and irreconcilable conflict and such finding cannot be said to be manifestly unwarranted by the evidence.

2. REAL ESTATE COMMISSION—*when broker entitled to.* A broker who has presented a purchaser ready, willing and financially able to make a purchase absolutely upon the terms authorized by the principal, is entitled to his commissions.

**Assumpsit.** Appeal from the Circuit Court of Morgan county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

E. ETTER, for appellant.

WILLIAM N. HAIRGROVE, for appellee.

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MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

Upon a trial by the Circuit Court, without a jury, appellee recovered a judgment against appellant for the sum of \$36 claimed to be due to him as commissions on a sale of real estate. The defendant by this appeal seeks to reverse such judgment, and assigns and urges as error that the finding of the court was not warranted by the evidence and that the court erred in refusing to hold as applicable to the facts, the second proposition of law submitted by the appellant, which proposition reads as follows:

"The law is that a contract to sell land against which the vendee can successfully plead the statute of frauds is not a valid contract, for the procuring of which a broker, employed to sell the land, may claim commissions. In this case there was a verbal contract to sell the lands in question and no binding contract made by the vendee and offered to the vendor for the purchase, which in law was not sufficient to bind the vendor, either to convey the property or for a refusal to convey would make him liable for commissions to the agent."

The material facts involved seem to be the following: Appellant was the owner of certain real estate situated in Waverly, Illinois. About August 1, 1905, he employed appellee to find a purchaser for the same at the cash price of \$1,800, for which services he was to receive a commission of two per cent. of the purchase price. Several months thereafter appellee secured a party who was ready, willing, and financially able to purchase the property at the price and upon the terms named; but appellant, when notified of such fact, declined to sell. The main controversy upon the facts was as to the time within which appellee was, under the terms of his employment, to find a purchaser. The only evidence as to the terms of the contract, which was oral, was the testimony of the parties themselves. Appellant testified that the time was limited to one month from the date of the em-

ployment, while appellee testified that the period was not limited. While the evidence is thus in sharp and irreconcilable conflict, the finding of the trial judge cannot be said to be manifestly unwarranted by the evidence. We are therefore not at liberty to disturb the same. "The finding of a judge to whom a cause is submitted for trial without a jury, is entitled to as much weight on controverted questions of fact, as the verdict of a jury, and will not be set aside by a court of review unless it is manifestly against the weight of the evidence." *Haug v. Haug*, 193 Ill. 645. If appellee's version of the contract be taken as the true one, he, in performance thereof, presented to appellant a purchaser who was ready, willing and financially able to make the purchase absolutely upon the terms authorized by his principal. He thereby became entitled to his commissions, notwithstanding the contract was in parol only. *Scott v. Stuart*, 115 Ill. App. 535; *Whalen v. Gore*, 116 Ill. App. 504. In the case of *Wilson v. Mason*, 158 Ill. 304, upon which appellant relies, the sale failed for the reason that the party produced by the broker refused to consummate the purchase whereby the owner, through no fault of his own, but because of the absence of an enforceable contract binding upon the purchaser, lost the benefit of the broker's services and hence was properly released from the payment of the commission. In the case at bar the sale failed through the refusal of appellant, the vendor, to sell. The *Wilson* case is thus distinguishable from the present one and therefore inapplicable. *Scott v. Stuart, supra*. It follows that the ruling of the court upon the proposition in question was not erroneous.

The judgment will be affirmed.

*Affirmed.*

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**Fannie S. Sill v. Lydia Burgess.**

1. DECLARATION—*what does not preclude plaintiff's right to stand by.* Obtaining leave to amend does not preclude a plaintiff from standing by his declaration where subsequently he appears in open court and disclaims and abandons the privilege of amending and declares his intention to stand by his declaration.

2. INTEREST—*when rule of equity with respect to, does not apply at law.* The rule which applies under some circumstances in suits in equity, more especially in proceedings to enforce the specific performance of a contract for the conveyance of land, to the effect that where there is a sale of land at a specified price to be paid for at a subsequent date, and possession is delivered to the vendee, the vendor is entitled thereafter to interest on the purchase money even though through mere negligence or inability to do so, he fails to convey, and although the contract is silent as to interest, upon the principle that the value of the possession is, in its rents and profits, equal to the interest, does not obtain at law.

3. RESCISSION—*what notice of election sufficient.* No particular form of notice of election to rescind a contract is necessary. Any act which clearly indicates an intention by the party to rescind a contract is sufficient and constitutes notice.

4. PROMISSORY NOTE—*what constitutes payment.* Where it is specially agreed that a promissory note taken for a contemporaneous consideration shall be accepted in payment of the consideration, such agreement is binding and operates as a payment.

Assumpsit. Error to the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

HERRICK & HERRICK and F. M. and H. I. GREEN, for plaintiffs in error.

SPENCER M. WHITE and RAY & DOBBINS, for defendant in error.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This writ of error is prosecuted by the plaintiff below to review the judgment of the Circuit Court sustaining a general demurrer to a declaration which con-

tains substantially the following allegations: That on April 10, 1902, the following written agreement was entered into by and between the defendant and Fannie S. Sill, the nominal plaintiff, to wit:

"This indenture witnesses, that Lydia Burgess hereby agrees to sell, and Fannie S. Sill agrees to purchase at the price of, and for the sum of \$4500 the following described real estate, situated in Champaign County, Illinois, to wit: (here follows description of same) with hotel furnishings complete, subject to existing lease expiring April 14, 1902, and all taxes and assessments levied after the year 1901. Said purchaser has paid \$2000 as earnest money to be applied on said purchase, and agrees to pay the balance of said purchase money in the manner following, to wit: \$2500 on or before the first day of January, 1904, or assume any mortgage that may be on said premises and difference to be paid in cash at Bank, Fisher, Ill., provided a good and sufficient warranty deed conveying to said purchaser a good title to said premises, subject as aforesaid, shall be ready for delivery. Fannie S. Sill agrees to keep buildings and furnishings insured to the amount of \$3000 in favor of Lydia Burgess. A complete abstract of title, brought down to date, to be furnished on or before November 1, 1903. In case the title upon examination is found materially defective within ten days after said abstract is furnished, then, unless the material defects be cured within sixty days after written notice thereof, the said earnest money shall be refunded, and this contract shall become null and void. Should the purchaser fail to perform this contract promptly on his part, at the time and in the manner specified, the earnest money above mentioned shall, at the option of the vendor, be forfeited as liquidated damages, including commissions payable by vendor, and this contract shall become null and void. Time is of the essence of this contract and of all the provisions thereof; this contract shall extend to and be binding upon the heirs, executors and administrators of the respective parties. This contract and the earnest money shall be held by Vennum's Bank for the mutual benefit of the parties hereto."

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It is then averred that on July 1, 1903, the said Fannie Sill for good and valuable consideration assigned all of her interest in said contract to the plaintiff; that at the time of the execution of said contract the said Fannie Sill executed and delivered to the defendant her note for \$2,000 which the defendant accepted as the cash payment of earnest money provided for in said contract; that she had since that time satisfied said note by paying thereon the sum of \$1,000 cash, and executing a new note for the sum of \$1,000, payable January 1, 1904, which said new note and cash payment were accepted by the defendant in payment of said original notes; that on January 1, 1904, plaintiff tendered to the defendant at Vennum's Bank, in Fisher, Illinois, the sum of \$2,500 and demanded a good and sufficient warranty deed conveying to him a good title to said premises, and also that he be furnished with a complete abstract of title to said premises brought down to date; that the defendant failed and neglected to on or before January 1, 1904, furnish the plaintiff or have ready for delivery to the plaintiff or the said Fannie Sill, said warranty deed, and that she also failed to on or before November 1, 1903, furnish said abstract of title; that said Fannie Sill and the plaintiff kept the buildings and furnishings mentioned in said contract insured in favor of the defendant for the sum of \$3,000 from the time of said contract until January 1, 1904, and had fully kept and performed all the covenants and conditions assumed thereby by the said Fannie Sill; that on January 2, 1904, upon the failure by the defendant to perform said contract, the plaintiff tendered to her the possession of the premises in question and demanded a return of all moneys paid upon said contract, together with his damages, etc.: by means whereof the defendant became indebted to the plaintiff in the amount received by said defendant from the said Fannie Sill, and for damages sustained by plaintiff through the failure of the defendant to perform said contract, etc.

When the demurrer to the foregoing declaration was sustained, the plaintiff asked and was granted leave to amend the same, but afterward relinquished the right to do so and elected to abide by it. It is insisted by defendant in error that the plaintiff by requesting leave to amend the declaration, after a demurrer had been sustained thereto, confessed its insufficiency and waived any possible error in the ruling of the court; that having elected to ask leave to amend, he abandoned his right to abide by the declaration, and that such election was final and unalterable.

This view seems to be supported by the opinion of the court in *Bennett v. Life Ins. Co.*, 203 Ill. 444, in which the following language is used: "If he (the pleader) asks leave to amend the pleading in order to obviate the defect pointed out by the demurrer, or asks leave to plead over, he thereby abandons his original pleading, and does not abide or stand by it."

The record in the present case shows, however; that after obtaining leave to amend, the plaintiff, in open court, disclaimed and abandoned the privilege and declared his intention to abide by the declaration as it then stood. Timely notice was thus afforded the court and opposing counsel and no one was misled in the premises.

The only remaining question for determination is whether or not the declaration states a cause of action. Defendant in error contends that it does not, for the reason that there is no averment that the plaintiff attempted to place the defendant *in statu quo* by tendering the hotel furnishings.

While it is the law that a party seeking to rescind a contract of this character must restore or offer to restore the property obtained, before he can recover back the purchase price paid (*Martin v. Chambers*, 84 Ill. 579), it does not appear on the face of the present declaration that the plaintiff in error ever took or retained possession of the hotel furnishings mentioned in the contract. No averment of a return or offer to

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return the same was therefore essential. If plaintiff in error as a matter of fact did take and retain possession of the furnishings, such fact becomes a matter of defense which can be raised under appropriate pleas.

It is next urged that there is no averment that the plaintiff tendered interest upon the unpaid purchase money, at the time he demanded the deed; that the full performance by him required that he should pay interest on the deferred payment from the time he took possession of the property. In support of such theory, counsel invoke the rule applied under some circumstances in suits in equity, more especially in proceedings to enforce the specific performance of contracts for the conveyance of real estate, to the effect that where there is a sale of land at a specified price to be paid for at a subsequent date, and possession is delivered to the vendee, the vendor is entitled thereafter to interest on the purchase money even though through mere negligence or inability to do so, he fails to convey, and although the contract is silent as to interest, upon the principle that the value of the possession is, in its rents and profits, equal to the interest. Whatever may be the rule in equity, we are satisfied that it is inapplicable in the present action which is at law. The contract is silent upon the question of interest and none was due or to become due by its terms. It is only where there has been an express contract to pay interest, or in cases prescribed by the statute, that interest is recoverable at law. There was no legal obligation resting upon plaintiff in error to pay interest and he was not bound to tender the same preparatory to rescinding the contract. It follows that the declaration was not defective in the particular claimed.

It is also insisted that the plaintiff was himself in default because the note of \$1,000 executed by Fannie Sill was unpaid at the time of the tender and demand for a deed.

The declaration expressly avers that the two notes

which were executed at the same time as the contract, "were then and there accepted by the defendant as the cash payment of two thousand dollars earnest money mentioned in said agreement."

Where it is specially agreed that a promissory note taken for a contemporaneous consideration shall be accepted in payment of the consideration, such agreement is binding and operates as a payment. Story on Bills and Notes, sec. 104. If the foregoing averment be taken as true, as it must, plaintiff in error was manifestly not in default as contended.

The claim that the declaration fails to show that notice was given the defendant of the intention to rescind, and that he was given a reasonable opportunity to perform, is unwarranted.

The averment of the declaration that after defendant in error had failed to perform the contract "the plaintiff did then and there tender back possession of said premises and demand a return to her of all moneys paid on said contract," etc., was clearly sufficient as to notice. Singer v. Treadway, 4 App. 60.

No particular form of notice of election to rescind a contract is necessary. Any act which clearly indicates an intention by the party to rescind a contract is sufficient and constitutes notice. Chrisman v. Miller, 21 Ill. 226; Murray v. Schlosser, 44 Ill. 14; Anderson v. McCarty, 61 Ill. 64.

The contention that the declaration is defective in that it does not aver that the defendant did not in fact deliver the deed when demanded, and that no demand for the abstract of title is alleged to have been made, are without merit. The points in question are sufficiently covered by the averment in the second count that the defendant had never "had said deed ready for delivery to the plaintiff or the said Fannie Sill, nor notified either of them that she, the defendant, had any such deed ready for delivery," and by the averment of the first count that a demand was made by plaintiff of the defendant that she "furnish a complete

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abstract of title to said premises brought down to date."

It is finally urged that an allegation that the plaintiff offered to assume any mortgages that may have been liens upon the premises, was essential.

It does not appear from the contract that there were any mortgage liens upon the premises at the time of the execution of the same. If any were placed thereon thereafter and before the time for performance, it was optional with defendant in error under the terms of the contract to elect whether to insist upon the cash payment provided, or the assumption of such liens, at the time the deed was demanded by plaintiff in error.

If defendant in error at that time chose the latter alternative and so notified plaintiff in error, and he failed or refused to perform in that regard, such fact constituted a matter of defense.

We are of opinion that the declaration stated a cause of action.

The judgment of the Circuit Court is therefore reversed and cause remanded.

*Reversed and remanded.*

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**W. E. Sprague et al. v. The Universal Voting Machine Company et al.**

1. CORPORATIONS—*to what extent courts will not supervise.* Courts will not interfere with the management of the internal affairs of a foreign corporation doing business in this state, notwithstanding such corporation has a large amount of visible tangible property in the state.

2. CORPORATIONS—*status of foreign, in Illinois.* The mere fact that a foreign corporation is licensed to do business in this state does not make it either a citizen of this state or a corporation of this state.

Bill for injunction, etc. Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

STONE & OGLEVEE, for appellants.

BARRY & MORRISSEY, for appellees.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

The chancellor in the Circuit Court sustained a general demurrer to a bill filed by certain stockholders in the Universal Voting Machine Company against said corporation and its officers. A decree was entered dismissing the bill for want of jurisdiction of the subject-matter. To reverse such decree, this appeal is prosecuted by the complainants.

The bill charges that the defendant, The Universal Voting Machine Company (hereinafter for brevity designated as the "Universal Company") is a Maine corporation; that it is admitted to do business in the state of Illinois, with offices in the city of Bloomington, Illinois; that its capital stock is \$500,000; that all of the property of said corporation is located in the state of Illinois and all of its officers live there; that complainants are stockholders, and sue in behalf of themselves and all other stockholders who may choose to join; that they own 270 shares of stock in said company of the par value of \$27,000; that the officers and majority stockholders have fraudulently contrived to wreck the said company, and to transfer all its property to the defendant, The Moline Voting Machine Company (hereinafter for brevity designated as the "Moline Company"), and that said officers and stockholders of the said Universal Company are also officers and stockholders in the Moline Company, to whom said transfer is sought to be made; that as a part of this plan to wreck the Universal Company, the said officers and majority stockholders voted \$100,000 bonds, and gave a trust deed of all the property of said Universal Company to secure the same, and then issued them to themselves for their own stock in the said Universal Company, thereby giving said officers

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and stockholders a lien upon the property of said company in fraud of the rights of these complainants and other minority stockholders who received no bonds; that this bond issue was made without the consent of these complainants, and was *ultra vires*; that, later, to wit, June 5, 1906, the said officers and majority stockholders transferred all the bonds of the said Universal Company so held by them to the Moline Company for shares of stock in said Moline Company, so that these said officers and majority stockholders aforesaid have now no stock or other interest in said Universal Company. That on June 10, 1906, these same officers and stockholders aforesaid, notwithstanding they had so transferred all their interest in the Universal Company to the said Moline Company for stock therein, attempted to transfer by bill of sale all of the property, patents, etc., of the Universal Company to the Moline Company for stock in said company, issued to themselves and to be issued to these complainants and other dissenting stockholders; that a few days later the defendant, H. W. Barr, who was vice-president and general manager of the Universal Company, and secretary of the Moline Company, removed all the property, patents, books, etc., of the said Universal Company from the offices and business quarters in Bloomington, Illinois, to Moline, Illinois, and turned them over to the Moline Company in pursuance of said pretended bill of sale aforesaid, and that since that time the said Universal Company has not been able to carry on any business whatever, and that the only action taken by the stockholders, or any of them, was the resolution of the informal stockholders' meeting; that complainants have made demand for an inspection of the books of said Universal Company, which demand has been refused; that there has been no statement of the business of said company for more than a year past; and, finally, that all of the foregoing facts were known by defendant, the Moline Company, from the beginning. The

prayer of the bill is that the fraudulent issue of bonds be cancelled except in so far as they have been paid for in money and in good faith; that said pretended bill of sale be declared null and void and the same delivered up and cancelled; that the Moline Company be perpetually enjoined from foreclosing the said deed of trust hereinabove set forth; that the officers having charge of the money or property be required to account, and that a temporary receiver be appointed to collect and preserve the assets of the company until it is again put in operation or proper steps have been taken to dissolve it.

A number of grounds are assigned in support of the action of the chancellor in sustaining the demurrer and dismissing the bill, of which we deem it necessary to consider but one, that is, that the courts will not interfere with the management of the internal affairs of a foreign corporation. That such is the law and that questions of that character are to be settled by the tribunals of the state which created the corporation, is established by the following, among other authorities: Bradbury v. W. & W. M. & S. Co., 113 Ill. App. 600; Madden v. Penn. E. L. Co., 181 Pa. St. 617; McCloskey v. Snowden, 212 Pa. St. 249; N. S. C. & G. Co. v. Field, 64 Md. 154; Kimball v. St. L. & S. F. R. R.; 157 Mass. 7; Condon v. M. R. F. L. Ass'n, 44 L. R. A. (Md.) 149; Howard v. M. R. F. L. Ass'n, 45 L. R. A. (N. C.) 853; Taylor v. M. R. F. L. Ass'n, 45 L. R. A. (Va.) 621.

And the rule applies even though the corporation has a large amount of visible, tangible property within the state. Madden v. P. E. L. Co., *supra*; McCloskey v. Snowden, *supra*. A well-considered case upon the subject is that of Bradbury v. W. & W. & M. & S. Co., *supra*, where the averments of the bill dismissed and the relief asked are substantially similar to the averments and prayer of the present bill.

What controversies relate to the internal management of the corporation is clearly and well defined

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in North State C. & G. M. Co. v. Field, 64 Md. 154, where it is said: "where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation and in case of a foreign corporation, our courts will not take jurisdiction." Madden v. Penn. E. L. Co.; McCloskey v. Snowden; Condon v. M. R. F. L. Ass'n; Howard v. M. R. F. L. Ass'n; Taylor v. M. R. F. L. Ass'n; Bradbury v. W. & W. M. & S. Co., all *supra*.

Counsel for appellant contend that the foregoing rule is not applicable in the present case for the reason that the Universal Company is licensed to and is doing business in this state by virtue of a statute thereof, and that under such statute it is subject to the laws of the state, to the same extent as a domestic corporation; that under the law of Illinois, a sale of all the property of a corporation in return for stock in another corporation is *ultra vires*.

Statutes of a state granting to a foreign corporation the privilege of doing business within the state do not make such foreign corporation a citizen or corporation of such state. Clark v. Ass'n, *supra*; Pa. R. Co. v. St. L. & P. R. Co., 118 U. S. 290.

It will be unnecessary to determine whether or not an exception to the general rule exists where, as here, all the property of the corporation is within the state, its officers reside here, and the act sought to be restrained is claimed to be *ultra vires*; for the reason that we are not advised by the bill as to the powers conferred nor the restrictions imposed upon the Universal Company and its officers by its charter and the laws of the state of Maine under and by virtue of which such corporation was organized and from which it derives its powers. We cannot, therefore,

well determine whether or not, under the laws of Maine, the acts of the appellees complained of amounted to a sale of the property of the corporation, or to a consolidation of the same with the Moline Company; whether under such laws said transaction was within the powers of corporations organized thereunder, nor whether the authorization of such action by a meeting of the stockholders was essential; nor what constituted a legal meeting of the stockholders, nor whether the consent of all stockholders was requisite.

In *Harding v. American Glucose Co.*, 182 Ill. 551, cited by counsel for appellant, the bill alleged and the evidence showed that the defendant corporation owned a plant consisting of real estate, buildings, machinery and fixtures which were situated within the state of Illinois, that it and five other corporations engaged in the same business were about to transfer all their properties to a new corporation to be created, which was to take and use all the plants of the six old corporations, thus forming a trust or combination for the purpose of regulating, fixing, controlling and maintaining the prices of glucose and grape sugar, of suppressing competition in the manufacture thereof, and of creating a monopoly therein, to the injury of the consumers of the manufactured product, and of the public generally. It was sought by the proceeding, among other things, to restrain the transfer or sale of the plant in question in pursuance of said plan. The court held that the public policy of the state of Illinois has always been against trusts and combinations organized for the purpose of suppressing competition and creating monopoly; that foreign corporations coming into the state of Illinois are subject to the same restrictions and duties as corporations formed therein, and have no other or greater powers; and further, that the courts have power to restrain a foreign corporation from transferring its property within the state, consisting largely of real estate, to another foreign corporation, in violation of the laws of Illinois relative

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to trusts and combinations, and contrary to its public policy, and that where the wrongdoers comprise the officers and a majority of the stockholders of the former corporation, any stockholder dissenting may, on behalf of himself and other stockholders, maintain a bill for that purpose. See, also, Dunbar v. Telegraph Co., 224 Ill. 9.

The acts complained of in the bill under consideration, do not appear to have been performed in furtherance of any illegal trust or combination, nor to be contrary to the general public policy of the state of Illinois, nor is any real estate sought to be transferred. To grant the relief prayed would be clearly an interference with the internal management of a foreign corporation.

The action of the Circuit Court was proper and the decree is affirmed.

*Affirmed.*

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#### Frank H. Meyer v. City of Decatur.

1. **APPEAL—what not final order in mandamus.** A judgment for costs entered against the petitioner in a *mandamus* proceeding is not a final and appealable order. It must appear by the order that the petition was dismissed in order to constitute the order final and appealable.

2. **JURISDICTION—when Appellate Court will raise question of.** The Appellate Court, of its own motion, will refuse to determine a cause where it appears from the transcript that it is without jurisdiction.

**Mandamus.** Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the November term, 1906. Appeal dismissed. Opinion filed June 1, 1907.

C. E. SCHROLL, for appellant.

W. NAY BOGESS, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

Appellant filed a petition in the Circuit Court of Macon county for a peremptory writ of *mandamus*, to compel the city of Decatur, appellee, to grant to him a license to sell intoxicating liquors at retail, in said city. The appellee city filed an answer to said petition, to which the petitioner interposed a demurrer. The court overruled the demurrer and the petitioner elected to stand by the same. It appears from the abstract of the record that the following judgment was then entered by the court: "Therefore, it is considered by the court that the respondent, city of Decatur, do have and recover of and from the petitioner, Frank H. Meyer, its costs and charges in this behalf expended and that it have execution therefor," and then follows the prayer and allowance of an appeal. This appeal must be dismissed, for the reason that the foregoing judgment is not final but interlocutory only. It is for costs merely. "That a judgment is final is not to be determined inferentially from the mere fact that costs and execution therefor are adjudged against one of the parties. The costs are regulated by statute and follow as an incident to final judgment, but the character of a judgment, whether final or interlocutory, is to be determined from other considerations than that it awarded costs. It must, to be final, terminate and completely dispose of the action." Lee v. Yanaway, 52 Ill. App. 23; 1 Black on Judgments, section 31.

The sustaining of a demurrer, though it be directed to the very elements of the cause of action or to the defense, is not final. 13 Am. & Eng. Ency. of Law, 24. In the case at bar, the petition was permitted to remain pending and undisposed of, and the judgment for costs cannot properly be said to have terminated and completely disposed of the action. Under the statute the Appellate Courts of this state have jurisdiction only of matters of appeal or writs of error from final judgments. Rev. Stat. 1905, p. 601.

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The People v. Village of Rossville.

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The fact that the jurisdiction of this court to entertain the appeal has not been challenged by appellee, would not warrant us in assuming jurisdiction. Where the law has not conferred jurisdiction of the subject-matter upon a court, the parties to a suit cannot, by consent, invest such court with jurisdiction, and it is the duty of such court to dismiss the appeal of its own motion, where a want of jurisdiction appears. *Town of Audubon v. Hand*, 223 Ill. 367.

The appeal must be dismissed for want of jurisdiction, at the costs of the relator, with leave to appellant to withdraw the record, and to either party to move for judgment in the Circuit Court.

*Appeal dismissed.*

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**The People, ex rel. Charles Smith, v. Village of Rossville et al.**

This case is controlled by the decision in *Meyer v. City of Decatur, ante*, p. 385.

**Mandamus.** Appeal from the County Court of Vermilion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1906. Appeal dismissed. Opinion filed June 1, 1907.

**CURTIS G. REDDEN and J. B. MANN**, for appellant.

**W. M. ACTON**, for appellees.

**PER CURIAM.** This is a petition for a writ of *mandamus* to compel certain members of the board of trustees of the village of Rossville to attend meetings of said board. A demurrer was sustained to said petition. The subsequent proceedings as they appear in the abstract of the record filed in this court were the following: "Demurrer sustained—petitioner duly excepts, and elects to stand by his petition. Judgment

for costs, appeal prayed and allowed. Bond, \$100 in 30 days from July 19th, A. D. 1906."

The foregoing record recites an election by petitioner to stand by his petition, but such election only authorized the court to enter a final judgment and cannot be held to have the effect to take the place of such judgment. The judgment for costs does not dismiss the petition or the suit or terminate the action. It is, therefore, not final, but interlocutory merely, and this court has no jurisdiction to entertain an appeal therefrom. Lee v. Yanaway, 52 Ill. App. 23. And this is so notwithstanding no question as to jurisdiction has been raised or argued by appellee. Where the law has not conferred jurisdiction upon a court, the parties to a suit cannot by consent invest such court with jurisdiction. Town of Audubon v. Hand, 223 Ill. 367; Meyer v. City, *ante*, p. 385.

The appeal must be dismissed for want of jurisdiction, at the costs of relator, with leave to withdraw the record, and to either party to move for judgment in the Circuit Court.

*Appeal dismissed.*

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Lewis C. Erbes v. William McDonald.

SECONDARY EVIDENCE—when competent to prove contents of documents out of jurisdiction of court. Secondary evidence may be offered to prove the substance of papers out of the jurisdiction of the court, where due efforts have been made to obtain the originals, and not otherwise.

Assumpsit. Appeal from the Circuit Court of Vermilion county; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

WALTER V. DYSEY and BUCKINGHAM & TROUP, for appellant.

DYER & WALBRIDGE and J. B. MANN, for appellee.

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Erbes v. McDonald.

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MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

Appellee recovered judgment in the Circuit Court, in an action of *assumpsit*, against appellant, for the sum of \$2,923, being the sum of \$1,500 for cash which appellee claimed to have advanced to appellant, and the further sum of \$900 which he claimed was paid by him to one Steiger at the request and for the use of appellant. The only controversy in this court is as to the latter item, which appellant contends was paid by appellee, not for the use and benefit of appellant, but as part of the consideration for benefits received by appellee by virtue of a certain contract which had theretofore been entered into between appellant and Steiger, and that the money in question was paid in accordance with the terms of a certain written agreement between appellee and appellant. Upon the trial appellant offered in evidence the contract between appellant and Steiger, which secured to appellant certain benefits in a grass twine factory located at Oshkosh, in the state of Wisconsin; but the court refused to admit the same. He then offered in evidence a copy of the written agreement alleged to have been entered into between him and appellee, which the court also refused to admit for the reason that no sufficient effort had been made by appellant to produce the original and thus lay the foundation for the admission of secondary evidence as to its contents. Prior to such offer it had been shown that the original agreement had been executed, but that it had never been in the possession of either appellant or appellee, or within the jurisdiction of the trial court. That when last seen by either of the parties it was in the possession of Steiger at Oshkosh. Steiger, upon his appearance as a witness at the trial, was served with a *subpoena duces tecum*, but failed to produce the agreement in response thereto. He testified that if such instrument had ever been left in his possession, it was then at his home in Oshkosh. Appellant contends

that inasmuch as the original instrument was without the state, beyond the jurisdiction of the court, and in the possession of a third person, not a party to the suit, secondary evidence of its contents was admissible, without a further showing. Such is not the rule in this state. Secondary evidence may be offered to prove the substance of papers out of the jurisdiction of the court, where due efforts have been made to obtain the originals and not otherwise. *Bishop v. Am. Pres. Co.*, 157 Ill. 307; *Fisher v. Greene*, 95 Ill. 94. Appellant should have procured to be taken the deposition of the witness Steiger at his home in Oshkosh, and have requested him to produce the instrument to be attached to such deposition. In case of his refusal, secondary evidence of its contents would then have been admissible. *Dickenson v. Breeden*, 25 Ill. 186; *Fisher v. Greene*, 95 Ill. 94.

It does not appear that appellant made any efforts whatever prior to the trial to secure the presence of the original instrument at the trial. The court, therefore, did not err in refusing to admit secondary evidence of the contents thereof. No other reason is urged in argument for reversal and the judgment of the Circuit Court will be affirmed.

*Affirmed.*

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#### American Express Company v. R. C. Stuart.

1. **EXPRESS COMPANY—care required of money order agent.** A person acting for an express company as its agent in selling its money orders, in caring for the money of such company, is bound only to the exercise of that degree of care and caution which would be exercised by an ordinarily careful and prudent person under like or similar circumstances.

2. **VERDICT—when not disturbed as against the evidence.** A verdict will not be set aside as against the evidence merely because the Appellate Court might, had it considered the evidence initially, have reached a different conclusion.

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American Express Co. v. Stuart.

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**Assumpsit.** Appeal from the Circuit Court of Coles county; the Hon. J. W. CRAIG, Judge, presiding. Heard in this court at the May term, 1906. Affirmed. Opinion filed June 20, 1907.

J. H. MARSHALL, for appellant.

A. J. FBYER and E. C. and JAMES W. CRAIG, JR., for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in *assumpsit* by appellant for the recovery from appellee of the sum of \$192.75, being the proceeds of certain money orders sold by appellee while acting as agent for appellant. A trial by jury resulted in a verdict and judgment for the defendant, to reverse which, the plaintiff below prosecutes this appeal.

There is no controversy as to the material facts involved, which are substantially as follows: On July 4, 1905, and for several years prior thereto, appellee, a druggist, doing business in the city of Charleston, Illinois, had been acting as agent for appellant in the sale of express money orders issued by it. Under the terms of his appointment it was his duty to keep the proceeds of all money orders sold by him separate and distinct from any other money he might have. In his drug store which was located upon the public square, he kept an iron fire-proof safe, which set back of the prescription case, and was not visible from the front part of the store. In the safe was a wooden drawer in which he kept the funds belonging to the appellant, and in another drawer, made of tin with an iron door, but which could be slipped from its socket without difficulty, he kept his private funds. The latter was furnished with a lock to which appellee alone had a key. Upon the safe was a four-number combination lock, which, during business hours, was kept partially turned on, so that the door could be opened through the use of the last number of the combination only. In

some way, not known to appellee, his prescription clerk had learned said number, and was able to open the safe, and had done so on a number of occasions, at times when appellee was absent from the store, or the clerk supposed him to be absent. Appellee admitted that he knew that Myers had, to this extent, access to the contents of the safe, and it does not appear that he did anything to deprive him of the same. Early in the evening of July 4th, appellee left the drug store in charge of his prescription clerk. At that time the cash drawer, which was locked, contained the sum of \$200, belonging to appellee, while the funds of appellant, amounting to \$192.75, were, as usual, left in a wooden drawer having no lock. The lock of the safe was partially turned, as hereinabove described. The clerk left the store room at 9:45 and appellee returned thereto at 10:05 o'clock p. m. He found the front door of the store locked. The rear door which was secured by a wooden brace, had been tampered with from the outside in a manner calculated to give the impression that an entrance had been effected from the rear. The funds in the cash drawer were found to be intact, but appellant's money was missing, together with some \$14 belonging to appellee which was kept in still another department of the safe. The clerk was the only person, other than appellee, who had a key to the store or knowledge of the number necessary to open the safe. On July 8th a warrant was issued for the arrest of the clerk, upon complaint by appellee charging him with having stolen the money in question.

Among the instructions given at the instance of appellee, was that numbered "three" in the abstract, which told the jury that if they believed, from a preponderance of the evidence that plaintiff's money was kept entirely separate and distinct from other funds in the hands of the defendant, and that he, in caring for it, exercised that degree of care and caution that the ordinarily careful and prudent man would have exercised under like circumstances and that the money

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American Express Co. v. Stuart.

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was stolen, "it would be their duty to find for the defendant."

The third refused instruction offered by appellant, in brief, told the jury that if they believed from the evidence that while the money of the plaintiff was in the possession of the defendant, the defendant permitted his clerk to have access to the same without his permission, and as a result of such access, the clerk stole the money, then the defendant should bear the loss.

It is urged by appellant that the prescription clerk was the sub-agent of appellee, appointed or employed without the authority, knowledge or consent of appellant, that appellee was, therefore, responsible for the acts of such sub-agent and that, if the theft of the money was committed by him, appellee is liable therefor. Such position is untenable. It does not appear from the evidence that the prescription clerk was authorized or employed by appellant either to sell or receive payment for the money orders, or to handle the proceeds of the same. He was as much a stranger to the transactions between appellant and appellee as though he had been employed elsewhere than at the drug store. While the fact that the alleged thief was employed by appellee in and about the store in the capacity of clerk, was proper to be considered by the jury in determining whether or not appellee had exercised the degree of care imposed upon him by law, it did not create the relation of sub-agency. Nor can it be said that appellee was liable as master for the acts of his servant, the clerk, as it is manifest that the wrongful appropriation of the money in question was not within the scope or line of his duties or employment.

The relation of appellant and appellee was merely that of principal and agent, and in caring for the property of appellant, his principal, appellee was only bound to exercise that degree of care and caution for its preservation and safety that an ordinarily careful

and prudent person would have exercised under like or similar circumstances. It follows that the trial court did not err in its rulings upon the foregoing instructions.

It is insisted by counsel for appellant that the conduct of the clerk in surreptitiously opening the safe without authority, was sufficient to arouse the serious suspicion in the mind of any ordinary man as to his honesty, and that this, and the further fact that appellee kept his own money in a locked drawer, while that of appellant was kept in one not so secure, so clearly show a lack of due care on the part of appellee as to warrant this court in disturbing the finding of the jury to the contrary.

There is much force in such contention, and while if sitting as jurors we might have reached a different conclusion than that of the jury as evidenced by its verdict, we are nevertheless unable to say that such opposite conclusion would be so clearly justified that all ordinarily prudent men would, after a careful and dispassionate consideration of the uncontested facts, arrive thereat without hesitation or dissent. The question as to due care was, therefore, one of fact for the determination of the jury. As has been said, the jury was properly instructed as to the law, and it does not clearly appear that it misconstrued the evidence or that it was actuated by passion or prejudice. It is well settled that in such state of the record courts of review are not at liberty to disturb a verdict unless the same is manifestly contrary to and unwarranted by the evidence.

We are not inclined to so hold in the present case and must accordingly affirm the judgment of the Circuit Court.

*Affirmed.*

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Dunkelbarger v. McFerren.

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**Clarence Dunkelbarger, Administrator, v. Donald McFerren.**

**APPEAL—when judgment not final.** A judgment for costs is interlocutory only, and no jurisdiction to review such a judgment exists in the Appellate Court.

Trespass on the case. Error to the Circuit Court of Vermilion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the May term, 1907. Dismissed. Opinion filed June 22, 1907.

J. C. McClure, C. G. Taylor and G. W. SALMANS, for plaintiff in error.

DYER & WALLBRIDGE and J. B. MANN, for defendant in error.

**PER CURIAM.** The judgment to review which this writ of error is prosecuted, reads as follows:

“Now come said parties by their respective attorneys and thereupon said plaintiff asks leave to file an additional count herein, which is allowed upon terms that he will pay all costs to date. And now the said defendant filed his demurrer to said additional count, which demurrer being sustained, the plaintiff excepts and elects to stand by said count and now *nolle*s all other counts. It is therefore ordered and adjudged by the court that said defendant do have and recover of and from said plaintiff his costs and charges by him in this behalf expended, to be paid in due course of administration. Whereupon said plaintiff having duly entered his exceptions herein, prays an appeal, which is allowed,” etc.

The foregoing judgment, being merely for costs, is interlocutory only, and this court, therefore, has no jurisdiction to entertain the present writ of error. Meyer v. City of Decatur, *ante*, p. 385. The same is accordingly dismissed at the costs of plaintiff in error, payable in due course of administration, with leave to

plaintiff in error to withdraw the record, and to either party to move for judgment in the Circuit Court.

*Writ of error dismissed.*

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**Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. James Dukeman, Administrator.**

This case is controlled by the decision in *C., C., C. & St. L. Ry. Co. v. Dukeman*, 130 Ill. App. 105.

Action in case for death caused by alleged wrongful act. Appeal from the Circuit Court of Coles county; the Hon. J. W. CRAIG, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

HAMLIN & GILLESPIE and H. A. NEAL, for appellant; L. J. HACKNEY, of counsel.

J. H. MARSHALL and F. K. DUNN, for appellee.

**PER CURIAM.** October 25, 1905, George Dukeman and Cynthia Dukeman, his wife, were killed while crossing the track of appellant on "E" street in the city of Charleston. In the suit to recover damages for negligently causing the death of Cynthia Dukeman there was a verdict and judgment against appellant for \$1,650, and in the case at bar, to recover damages for negligently causing the death of George Dukeman, there was a verdict and judgment against appellant for \$2,000. The judgment in the former case was reversed by this court on appeal, in an opinion filed November 27, 1906. 130 Ill. App. 105.

The records in the two cases are substantially identical and the same questions are involved in this appeal as were presented for determination in the former appeal, except as to the propriety of giving the fifth instruction offered on behalf of appellee upon the trial of the former case, which instruction was not offered by appellee upon the trial of this case.

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Ellsworth v. Cummins.

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For the reasons given in the former opinion, the court did not err in refusing to give the peremptory instruction offered by appellant, or in refusing to instruct the jury that appellee was entitled to recover only nominal damages.

The fourth instruction given at the request of appellee is identical with the first instruction given on behalf of appellee upon the trial of the case to recover damages for the death of Cynthia Dukeman, and for the reason given in the former opinion we are constrained to hold that said fourth instruction was misleading and prejudicial to appellant.

A majority of the court are also of the opinion that the damages awarded by the jury are excessive.

The judgment will be reversed and the cause remanded for another trial.

*Reversed and remanded.*

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**Austin Ellsworth et al. v. Mary A. Cummins.**

1. **DRAM-SHOP ACT**—*right of mother to recover for loss of son's support.* Notwithstanding the son's father is living, the mother of a minor son may recover for loss of support resulting from the habitual intoxication of such son caused by the defendants.

2. **EXEMPLARY DAMAGES**—*when may be recovered in action for loss of son's support.* If circumstances justify, a mother may recover for the loss of her minor son's support resulting from the habitual intoxication of such son caused by the defendants.

3. **ARGUMENT OF COUNSEL**—*when impropriety of, will not reverse.* Improper language used in an argument to the jury will not reverse where such language was provoked by the remarks of the complaining counsel.

Action for damages for loss of support. Appeal from the Circuit Court of Vermilion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

O. M. JONES and BUCKINGHAM & TROUP, for appellants.

MABIN & MORRIS, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Mary A. Cummins brought suit in the Circuit Court of Vermilion county against Austin Ellsworth, Charles Gerulis, George W. James and William Arkley, and eight others, to recover for damages alleged to have resulted to her in her means of support by reason of the sale of intoxicating liquors by such persons, to her minor son, David G. Cummins. There was a verdict against the four persons above named, in the sum of \$975, upon which the court rendered judgment in favor of said Mary A. Cummins. Said Ellsworth, Gerulis, James and Arkley have appealed.

The declaration consisted of one count, and in substance charged that said appellee was the mother of one David G. Cummins, who was of the age of nineteen years and who was employed as a coal miner, and was earning \$75 per month prior to the time of the injuries complained of; that said appellants, in January, February and March, 1906, who were then engaged in selling intoxicating liquors, sold and gave to said minor intoxicating liquors and caused him to become habitually drunk, whereby he wasted his earnings and became reduced in body and in estate, and she, appellee, lost his support and was thereby injured, etc. Appellants filed a plea of not guilty.

The evidence disclosed that the husband of appellee was in the penitentiary and had been there for about two years prior to the time the suit was tried; that appellee was living separate and apart from her husband and was supported by means of her own labor and by means which her minor son, David, contributed to her aid, varying from \$40 to \$60 per month; that by reason of the habitual drunkenness of said minor son, said appellee lost the means of support which she had previously received from him.

Appellants first contend that the father of David,

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being alive, alone had the right of action, if any existed, against appellants, and argue that because the father only, could recover for the wages of the minor, by analogy, the mother had no right to maintain suit. This argument is of no force in this class of cases, which is governed by statute, which, so far as applicable, is as follows: "Every \* \* \* parent \* \* \* who shall be injured in \* \* \* means of support \* \* \* in consequence of the intoxication \* \* \* of any person \* \* \* shall have a right of action in his or her name \* \* \* against any person or persons who shall by selling \* \* \* intoxicating liquors have caused the intoxication, in whole or in part, of such person."

In the case at bar, the mother was living separate and apart from her husband and derived her means of support from her own labors and those of such minor son. In such a case there is no reason why she, as a parent, cannot maintain an action against a dram-shop keeper for injury to her means of support caused by sales of intoxicating liquor to her minor son. *Lossman v. Knights*, 77 Ill. App. 670.

Appellants next contend that the amount of the verdict was too large and that the jury, by the instructions of the court, were permitted to give appellee punitive damages, which they insist could not be properly allowed. It has been held that where a dram-shop keeper continues to sell intoxicating liquor to an adult in the habit of drinking to excess, and in disregard of his wife's warning to desist, exemplary damages may be awarded her. *McMahon et al. v. Sankey*, 133 Ill. 636.

In the case of *Earp v. Lilly*, 120 Ill. App. 123-128, this court held that where a husband was in the habit of getting intoxicated and such fact was known to the dram-shop keeper, a sale by him to such husband was unlawful and it became a question of fact for the jury to say whether or not the selling was wilful and wanton.

In this case there is no claim made that David G. Cummins, the minor, ever represented himself to any of appellants as being an adult. That he was a minor was admitted and appellants dealt with him as such. A sale by a dram-shop keeper of intoxicating liquor to a minor, the seller knowing the fact of minority, is as much a wilful violation of the law upon that subject as a sale to an adult husband after request to desist therefrom by the wife. We are not disposed to disturb the verdict of the jury upon that ground, and hold that there was no error upon the part of the court in giving an instruction which permitted the jury to allow exemplary damages.

Appellants next argue at considerable length that there was gross error in the conduct of counsel for appellee before the jury. The record of the conduct complained of is too long to be here reviewed, but we would be disposed to reverse this case solely upon the ground that counsel for appellee, in his closing address to the jury clearly transgressed the rules of practice and by his unfairness toward appellants put in hazard the very interests he was called upon to protect, were it not for the fact that counsel for appellants had in a great measure provoked such conduct by saying to the jury that: "She (appellee) has come here with her case reeking with the odor of the penitentiary and the jail." This language was also unwarranted and tended to provoke the conduct of appellee's counsel, which, otherwise, would have been reversible error.

The verdict was right upon the merits and the judgment is affirmed.

*Affirmed.*

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Field v. Devereaux.

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**Agnes Field v. Lucy Devereaux et al.**

**VERDICT**—when set aside as against the evidence. A verdict unwarranted by the evidence will be set aside on review.

Assumpsit. Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

WILLIAM R. BRAND, for plaintiff in error.

S. P. ROBINSON, for defendants in error.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Agnes Field brought suit in the Circuit Court of McLean county, against Lucy Devereaux and her husband, John J. Devereaux, upon a promissory note, dated May 10, 1899, for the sum of \$500. Lucy Devereaux and John J. Devereaux pleaded payment, and upon trial before a jury upon that issue a verdict was returned in their favor. Judgment was rendered upon the verdict, and Agnes Field appealed.

It appears from the evidence that appellant and Lucy Devereaux were sisters; that their mother conveyed to them a house and lot in Bloomington, Illinois, and that on the tenth day of May, 1899, Lucy Devereaux bought her sister's interest in said property at \$500, received a deed therefor and made a note for that sum due in four years from said date, with interest payable annually, which note was signed by herself and John J. Devereaux, and was secured by a mortgage upon said property.

Payments, mostly in sums of five dollars each, were made upon said note until about the middle of March, 1902, at which time about \$120 had been paid on said note, and when, it is claimed by appellee, appellant agreed to accept five dollars, in addition to the sums

that had been already paid, in full satisfaction of said indebtedness and to deliver up the note and mortgage.

Whether or not the said note was thus to be treated as fully satisfied, was the only question submitted to the jury. Appellant assigns as error the refusal of the court to grant a new trial and contends that the finding of the jury was against the manifest weight of the evidence. Upon that contention we are constrained to hold that error is well assigned.

It is claimed by appellee, Lucy Devereaux, that appellant came to her home in Bloomington, in March, 1902, only a little over one year before said note was due, and agreed that if said Lucy would pay appellant in cash the sum of five dollars, in addition to what had already been paid, appellant would surrender and give up said note and mortgage, and that appellee then paid said sum of five dollars and received the said note and mortgage.

The oral evidence concerning this claim is very conflicting and unsatisfactory. Lucy Devereaux testified that the note, upon payment of five dollars, was, by agreement, treated as her own and surrendered to her as satisfied; that she had the note in her possession continuously from March, 1902. John J. Devereaux testified that he saw the note and mortgage in his wife's hands and heard her say in the presence of the appellant, that the note was hers and was at an end. This testimony appellant denied and said that she never made the arrangement alleged by appellees, and that she never gave or surrendered the note to said Lucy; that the same was all the while in her possession until she wanted to have it renewed in 1903, when she sent it to one D. J. Sammon for the purpose of having him take a renewal note for her. Sammon testified that he, as attorney for appellant, had the note in his safe and in his keeping at the time Lucy Devereaux claimed to him that she had the note and mortgage in her possession.

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If the verdict had been rendered upon such sharply conflicting evidence alone, we would not be disposed to disturb it, but such is not the case. Appellant introduced in evidence a written statement of account between the sisters in the handwriting of Lucy Devereaux in which it appears that she paid appellant \$5 upon each of six different occasions after March, 1902, in which written statement said six payments were credited, among or with other payments, aggregating \$153.50, which she deducted from the loan of \$500, leaving a balance unpaid appellant upon such statement of \$346.50. There were also introduced in evidence receipts for four of said payments of \$5 each, dated respectively, May 1, 1902, June 25, 1902, August 15, 1902, and September 4, 1902, in which it was stated that appellant received said sums *on mortgage note*.

This statement in writing, appellee, Lucy Devereaux, attempted to explain by saying that she made it to show what the balance was when they called it square, but she did not offer any reasonable explanation of how she came to make payments upon said indebtedness *after March, 1902*, in precisely the same manner as she had prior to that time, nor how she came to take receipts from her sister for the amounts so paid *on the mortgage debt*.

This action upon the part of said Lucy Devereaux, evidenced by this statement and these receipts, was wholly inconsistent with her theory of payment in full, and no sufficient explanation thereof was made to appear. The verdict of the jury was unwarranted by the evidence and should have been set aside.

The judgment is reversed and the cause remanded.  
*Reversed and remanded.*

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#### Amanda Beggs v. The First National Bank of Arcola.

1. CONSIDERATION—*what essential to forbearance as.* In order to constitute forbearance as a valid consideration, there must be an agreement to forbear or an extension of credit to the debtor.

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2. INSTRUCTION—*must not leave issue of law to jury.* An instruction which permits the jury to determine what is or is not a pledge in law, is erroneous.

**Assumpsit.** Appeal from the Circuit Court of Douglas county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

EDWARD C. and JAMES W. CRAIG, JR., for appellant;  
JOHN H. CHADWICK, of counsel.

ECKHART & MOORE, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

The First National Bank of Arcola brought suit in the Circuit Court of Douglas county against Amanda Beggs to recover upon two promissory notes. There was a verdict in favor of the bank in the sum of \$4,536.52 upon which there was a judgment. Beggs appealed.

Frank J. Beggs, a son of appellant, became indebted to appellee upon two promissory notes, both due on demand, one dated July 2, 1901, for \$1,650, and the other dated May 28, 1902, for \$2,800, upon which said notes the interest was paid up to June 30, 1906. About the first of May, 1904, J. R. Beggs, who was president of the bank, and who was also a son of appellant, went to his mother's home, where it is claimed by appellee that said Amanda Beggs, who was the owner of thirty-three shares of the capital stock of the bank (having one certificate for twenty shares and one for thirteen shares), turned her certificates of stock over to said J. R. Beggs, as president of the bank, as collateral security to such unpaid and past due notes of Frank J. These certificates of stock were taken by such president of the bank and retained by him, indorsed by the mother, until about the first of June, 1905, when J. R. Beggs returned or redelivered such certificates to appellant, whereupon she, either on the same day of the

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redelivery of the certificates or very soon thereafter, signed said notes of Frank J. Beggs. Suit was commenced upon said notes against appellant on the thirteenth day of August, 1906, and judgment rendered as heretofore stated. The issue which the jury had to determine was whether or not there was any consideration for the signing of said notes by appellant.

Upon this subject, J. R. Beggs testified that in May, 1904, he saw his mother and told her that he, as president of the bank, would not transfer to her upon the books of the bank, the certificate for the thirteen shares of bank stock which had formerly been owned by Frank J., and by him assigned to appellant on September 1, 1902, until he (Frank) had paid the bank what he owed it; that at the time Frank turned over to her the thirteen shares of stock Frank's indebtedness to the bank was about \$4,450; that the mother then said she would turn over to the bank her certificate for the thirteen shares and also the one for twenty shares as collateral to secure Frank's debt to the bank and then gave him the certificates which he held as such officer for the bank until about the first of June, 1905. He further testified, that shortly prior to such last mentioned date he had received a letter from the comptroller of the currency to the effect that the bank could not hold its own stock as collateral security for a loan, whereupon he advised his mother of that fact; that very soon after telling her of the receipt of the comptroller's letter he saw appellant alone at her home; that he said to her that he brought the notes for her to sign and the stock to be returned; that he further said that he did not want to see her stock sold and that to sell it would hurt the credit of the bank, whereupon she replied that she supposed she would have to sign the notes; that she did sign them, and he thereupon redelivered to her the certificates of bank stock.

Appellant testified that her son, J. R. Beggs, who had the custody of her certificates for her, when he

first came to her, brought with him such certificates and wanted to know if she would not let the bank have the stock as collateral to Frank's notes; that she said she did not want to do it, but he insisted that they must have some collateral; that nothing was said about signing the notes and she did not think anything was said about J. R. Beggs not being willing to transfer the thirteen shares to her. that Frank had so previously assigned; that J. R. Beggs said he did not see any other way out of it and insisted on her signing over the certificates and that she finally wrote her name upon the back of the certificates, and J. R. Beggs took them away with him; that Frank J. was present at the time of this conversation when she signed or indorsed the certificates and delivered them to J. R. Beggs.

Appellant further testified that prior to the date when she signed the notes, J. R. Beggs brought the certificates back and turned them over to her, saying at the time that the bank examiner had been there and had told him that he could not hold the certificates as collateral to the notes; that he wanted to know if she would sign the notes and that she replied that she did not know whether she would or not and that she did not sign them on that day and did not then agree to sign them; that on a subsequent date he came back and insisted upon her signing the notes and she did so. Appellant denied that she said to J. R. Beggs that she would sign the notes to keep the stock from being sold and testified that nothing was said to the effect that the bank stock would be sold if she did not sign the notes.

Frank J. Beggs testified that he was present when his brother, J. R. Beggs, brought to the mother the certificates of stock and delivered them to her; that J. R. then said that he could not hold them as collateral to the notes and that as he started to go away, appellant told him to take the certificates back and put them in the bank for her; that at the time nothing

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was said about appellant signing the notes and that she did not then agree to so sign, and that he was not present upon the day when, in fact, his mother did sign.

This was, in substance, the evidence as disclosed by the record as to what passed between the parties pertaining to the subject-matter of consideration.

We are constrained to hold that there was no consideration for the delivery of the stock by appellant to the bank, nor any consideration for her signing the notes sued upon. Appellee argues in support of its theory, that there was an advantage to appellant in not having her stock sold under the National Bank Act; there was a redelivery to her of the certificates of stock, and that no suit was brought against said Frank J. Beggs and levy made upon the certificates, whereby appellant was enabled to retain the certificates in her own control. None of these claims, however, attains to the legal status of a consideration. The president of the bank could not rightfully have refused to transfer upon the books of the bank the shares of stock which had been duly assigned by Frank J. to his mother, and in case he did refuse, a remedy was at hand to compel a discharge of his duty in that regard. The stock was the stock of appellant and could have been reclaimed by her at any time, or an appropriate remedy maintained for its return. At no time was it subject to sale without her consent either under the law of the United States or of our own state.

At the time of the first conference between J. R. Beggs and his mother he had had the custody of the certificates for her for several months and brought them to her with the request that she would allow the bank to hold them as collateral to Frank's past due debts; she received nothing whatever for transferring such stock to appellee, neither did Frank J. receive any advantage or thing of value; nor did the bank part with anything of value or waive any right or

claim it then had, nor did it agree to postpone the enforcement of its claim against Frank J. Beggs. In fact, when the stock was first turned over by appellant there was no undertaking of any character entered into by appellee nor any right it then had released or impaired.

The fact that the bank did not sue Frank J. cannot, of itself, afford a consideration in the absence of a contract or agreement to forbear or postpone collection. In such cases there must be an agreement to forbear, or an extension of credit to the debtor. *Vehon v. Vehon*, 70 Ill. App. 40.

As the first delivery of the stock by appellant was of no force, it follows that a redelivery merely to appellant added nothing, as it was a turning back to her of her own property.

The verdict of the jury finding that there was a consideration for the signing of the notes involved by appellant was against the manifest weight of the evidence and should have been set aside.

There was error also in refusing to allow Frank J. Beggs to testify to what was said by J. R. Beggs and appellant at the time the certificates were first turned over by the mother to J. R. Beggs. There was a conflict in the testimony between J. R. Beggs and appellant as to what took place at that interview and the latter testified that Frank J. was present when the conversation took place. No good reason has been suggested why Frank J. Beggs was not as competent a witness to testify to the subject-matter of that interview as the two other witnesses who testified concerning it.

There was error also in the giving of the fifth instruction for appellee. That instruction, in substance, told the jury that if they believed from the evidence that appellant pledged the certificates of stock and delivered them to the bank to secure the notes of Frank J., then the bank had an interest in said shares and that, if appellant afterward signed the notes in

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consideration of a redelivery to her of the said certificates, such redelivery would be a sufficient consideration for the signing of the notes by her.

This instruction made the jury the judges of the law in determining what was or was not a pledge. It also was misleading, as from it the jury could well have said, since the legal requisites of a pledge were not stated, that if the stock was delivered by appellant to the bank, even though without consideration, to secure the notes of Frank J., a redelivery thereof to appellant would be a consideration for the signing of the notes.

The judgment is reversed and the cause remanded.  
*Reversed and remanded.*

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### The Wabash Railroad Company v. Shelby Curtis.

1. COMMON CARRIER—*when contract of shipment entire.* A contract of shipment is considered to be one entire contract of carriage from the point of shipment to that of destination, notwithstanding it provides that the "responsibility of each carrier" is "to extend hereunder only" to the line of the receiving carrier, where no provision is made by which any other person than the receiving carrier is to choose the connecting carrier and the receiving carrier does, in fact, choose such connecting carrier.

2. COMMON CARRIER—*what essential to bind shipper to restrictions in contract of shipment.* In order that restrictions contained in a bill of lading shall bind the shipper, it is essential that such shipper either by himself, or his agent, at the time of making the contract of shipment knew the terms and conditions of the bill of lading and assented thereto.

3. COMMON CARRIER—*when common law liability of, will be enforced.* The common law liability of a carrier can only be defeated by showing that the shipper, who delivers his goods to the carrier for transportation and pays therefor and who accepts a written contract of such shipment imposing restrictions, knows the contents of the contract and assents to its terms.

4. FREIGHT RATES—*what prima facie evidence of reduction in.* A declaration contained in a bill of lading to the effect that a part of the consideration entering into the agreement of carriage is the reduction of rates, is *prima facie* evidence of such reduction.

5. BILL OF LADING—*authority of agent to assent to restrictions contained in.* If an agent has authority to make a consignment, he also, in law, has authority to consign upon such terms as the carrier would make upon that kind of a shipment, and his act in that regard will bind his principal.

Action on the case. Appeal from the Circuit Court of Vermilion county; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the May term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

C. N. TRAVOUS, for appellant.

J. B. MANN and DUNDAS & O'HAIR, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Shelby Curtis brought suit in the Circuit Court of Vermilion county against the Wabash Railroad Company to recover damages alleged to be due him from the railroad company for the failure upon the part of the company to transport safely and within a reasonable time thirty-six carloads of hogs, shipped by Curtis, from New Salem, Illinois, and various other points in that vicinity to East Cambridge, Massachusetts. There was a verdict and judgment in favor of Curtis in the sum of \$2,000 from which the railroad company has appealed.

It appears from the evidence that appellee, through his agents or employes, shipped from various points in Illinois a number of cars of hogs, which were duly consigned to East Cambridge, Massachusetts, over the line of appellant, and that of its connecting carrier, and that upon each shipment appellee received from the company a live stock contract in which the carrier sought to limit its liability to its own line of road and in which it also sought to be released from all liability unless a claim for damages, duly verified, was presented to the home office of appellant within ten days from the time the stock was removed from the cars.

Appellee claimed upon the trial that there was an

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unreasonable delay in the transportation of the hogs and that proper care was not given them in transit, whereby he suffered a loss, which appellant should make good to him. Appellant first contends that there can be no liability upon its part in the absence of proof that the stock suffered damages by reason of the negligence of those in charge of the stock while on appellant's line of road. While it is true that the contract of shipment contained the words, "the responsibility of each carrier to extend hereunto only to its own line," yet the contract upon its face was an agreement upon the part of appellant to ship the hogs from the place or places of consignment in Illinois to East Cambridge, Massachusetts. There was no provision in the contract for appellee's choosing or naming in any way such connecting carrier at the eastern terminus of appellant's line of road, or for the delivery of the hogs to appellee at any place other than East Cambridge. Appellant chose its own connecting carrier, without consulting appellee or notifying him that he would be expected to receive the hogs at the connecting point or select the connecting carrier. Under such circumstances the contract will be construed as an entire contract of carriage from point of shipment to destination. *Wabash R. R. Co. v. Thomas*, 122 Ill. App. 569, 570; affirmed 222 Ill. 337.

Appellant next contends that inasmuch as it appeared from the evidence without contradiction that appellee's agents at the time the contracts in question were signed and accepted by such agents for appellee, could each read and write and were of mature years, and had the means of knowing the contents of the contracts, that it was error upon the part of the trial court to hold and so instruct the jury that appellee was not bound by the terms of such contract unless it was made to appear that he or his agents, at the time of the making of such contracts, knew the terms and conditions of such contracts and had assented thereto.

The trial court was right in its holding upon this

subject. This question is not an open one in our state. C. & N. W. Ry. Co. v. The Calumet Stock Farm, 194 Ill. 9; C., C., C. & St. L. Ry. Co. v. Patten, 203 Ill. 376; The Wabash Railroad Co. v. Thomas, 122 Ill. App. 569, s. c., 222 Ill. 337.

Appellant next assigns as error the giving by the court of appellee's first instruction, which was in the following words:

"The court instructs the jury that before they can consider the terms and conditions of the live stock contract offered in evidence by the defendant, they must believe from the weight of the evidence the following facts: First, that there was a good and lawful consideration given by the defendant to the shipper for the signing of such contract; second, that the shipper, or his agents, knew the terms and conditions of such contracts at the time the same were signed, and that he assented to such terms and conditions; third, that the plaintiff's agent, who signed such contracts, was authorized by the plaintiff to sign the same; and, unless the jury believe that all these facts existed at the time such contracts were signed, they should not consider the same."

The contract involved provided that the rate, viz., thirty cents per cwt., was a reduced rate agreed upon by the parties and that in consideration thereof the shipper assented to the limitations expressed in the contract. Whether or not appellee in fact knew of the terms of the contract and assented thereto was a question of fact for the jury. If under the evidence the jury found that appellee did know of the provisions of the contract declaring that the rate was a reduced one, then such declaration as to rate became at least *prima facie* evidence of a reduction in rates, and, if uncontradicted, afforded a consideration for the limitation expressed. Since there was no evidence in the case tending to dispute the statement in the contract to the effect that the rate was a reduced rate and there was some evidence tending to show appellee's knowledge of the contents of the contract, it was

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error to tell the jury that they could not consider the terms of the contract as to such limitation unless there was proof of a consideration given by appellant to the shipper independently of and in addition to the reduction of rates so declared to be a consideration.

It was also error to require the carrier to show that the agent of appellee had express authority from his employer to assent to the terms provided for in the contract of shipment. If the agent had authority to make the consignment, then he also had authority to consign upon such terms as the carrier would make upon that kind of a shipment, and his act in that regard would bind the principal. *Brown et al. v. L. & N. R. R. Co.*, 36 Ill. App. 140; *Jennings v. G. T. R. R. Co.*, 127 N. Y. Reports, 438; *Waldron v. Fargo*, 52 Hun, 18.

Appellant next contends that no recovery can be had against the carrier upon its common law liability since there was a contract in writing, and suit, if any can be maintained, must be brought upon such written contract. This is a misconception of the law upon that subject. The common law liability of the carrier can only be defeated by showing that the shipper, who delivers his goods to the carrier for transportation and pays therefor and who accepts a written contract of such shipment imposing restrictions, knows the contents of the contract and assents to its terms. The *onus* of proving this contract and such knowledge upon the part of the shipper, is upon the carrier.

For the errors indicated in appellee's first instruction, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

**Mattoon Heat, Light & Power Company et al. v. Richard Walker.**

1. REPLEVIN—*when value of property need be stated in affidavit for.* It is only when the jurisdiction of the court depends upon the value of the property involved that such value need be stated in the affidavit.

2. REPLEVIN—*when proof of value of property involved in, not material.* It is not competent to show by evidence the value of the property involved in an action of replevin merely to lay the foundation for an appeal to the Supreme rather than to the Appellate Court.

3. INSTRUCTION—*upon interest of plaintiff; when refusal not prejudicial error.* It is not prejudicial error to refuse a correct instruction which tells the jury that they have the right in weighing the evidence of a party to take into consideration the fact that he is a party in interest in the result of the suit, where another instruction was given which told the jury that in determining how far each witness is entitled to credit, they might take into consideration his relationship to the parties in the suit.

Replevin. Appeal from the City Court of Mattoon; the Hon. LAPSLEY C. HENLEY, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed June 1, 1907.

**ANDREWS & VAUSE, for appellants.**

**EDWARD C. & JAMES W. CRAIG, JR., and CRAIG & KINZEL, for appellee.**

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Richard Walker, the appellee, brought suit in replevin against appellants to recover the possession of one iron tank and some copper coils in the tank, upon the trial of which cause a jury returned a verdict in favor of appellee. Judgment was rendered upon the verdict and appellants have prosecuted this appeal.

It appears from the evidence that the Mattoon Heat, Light & Power Company had upon, or near, its grounds, which it had formerly used in the transaction

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of its business, an iron tank in which were four coils of copper pipe, which tank and coils had been used together, as they then stood, as a heating appliance, and that one Horace W. Tolle, acting as agent for said heat and power company, had authority and direction to sell the same; that a sale was made by Tolle to appellee at the agreed price of \$50 and payment of that sum made, whereupon Walker assumed possession of the tank and coils and was about to remove the coils when he was prevented therefrom by the agent, Tolle, and he, appellee, thereupon sued out his writ of replevin to recover possession of the tank and coils.

The only question in the case is whether or not the sale, as made by Tolle to Walker, was a sale of the tank and contents, or a sale of the tank alone, and the evidence upon this subject is within a narrow compass.

Appellee testified that he said to Tolle, when he examined the tank, that he would give him \$50 for the "whole concern as it stood," in which he is corroborated by Mr. Richard McKenzie, who heard the conversation between Walker and Tolle. Eaglin testified that he was present at the tank after the sale, when he heard a conversation between Hall and Tolle, when in response to a question by Hall to Tolle asking if he had reserved the copper, Tolle answered: "No, I never thought a thing about it."

Tolle denies that he sold the copper coils or "the concern just as it stood," but does not deny the conversation with Hall to the effect that he forgot to reserve the copper coils, which would seem to be an admission upon his part that a reservation was necessary.

Whether or not the coils were sold with the tank was purely a question of fact to be determined by the jury from what passed between the parties as shown by the evidence. The jury not only in their general verdict found such issue in Walker's favor,

but by a special finding returned with their general verdict found that: "At the time the sale was made, Tolle, the agent of appellant, understood and agreed that the four coils of copper piping were a part of the property sold."

The evidence fully and amply sustains the finding of the jury upon this issue.

It was not error on the part of the court to refuse to allow appellants to prove a conversation between John Hall and Tolle on the next morning after the sale was made, to show that a proposition was made to Hall to return the \$50 that had been paid by Walker, as the good faith of Tolle was not involved in the transaction as contended by appellants.

The authority of Tolle to sell the tank is in no way assailed, and since he had authority to sell the tank, he had authority to sell it as it stood. That being true, the only question is, what did he sell, not what faith he employed in making the sale.

Appellants next contend that there was error in refusing to allow them to show the value of the property in controversy and argue that proof of such value was important in determining the right of appeal from this, to the Supreme Court; that if appellants had been permitted to prove the real value of the property it would have been shown to have been worth more than \$1,000; that appellee's affidavit as to the value of the property was not conclusive and that proof of value by appellants was proper because at *some subsequent time* that question might become of vital importance to appellants.

The statement of value in appellee's affidavit was the statement of a matter wholly immaterial so far as the trial of the case upon its merits was concerned. In replevin, it is only when the jurisdiction of the court depends upon the value of the property involved that such value need be stated in the affidavit. Rice v. Travis, 216 Ill. 249-256; People v. Core, 85 Ill. 248.

The property described in the affidavit and writ of replevin was taken by an officer and delivered to appellee.

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lee. Thereupon the title to the property, or right to its possession, and not its value, became the issue. The value of the property could become important only in the event that appellants recovered a judgment for its return, when an assessment of its value might be proper as an incident to the trial but not as a part of it. Colby on Replevin, 2nd ed., sec. 1134.

Appellants asked their witness, Tolle, what was the fair cash market value of the copper coils; to which an objection was made upon the ground that it was a matter not material to the trial. That objection was sustained and appellants excepted thereto without in any way advising the trial court that such evidence was offered for the purpose for which it is now alleged to be competent. Appellants made no other offer to prove the value of the property in any way and did not then claim that the evidence was offered upon any ground other than that it was material to the trial then in progress.

Appellants must, therefore, be held to have offered such testimony upon that ground alone and cannot be allowed to now state in this court for the first time that the offer was made to overcome at some subsequent time the effect of appellee's affidavit as to value. The ruling of the court in this respect was free from error.

Appellants' fourteenth instruction offered, which stated that the jury have a right in weighing the evidence of a party to take into consideration the fact that he is a party and interested in the result of the suit, announced a correct rule of law and should have been given, but we do not think the error in refusing it was so prejudicial as to warrant a reversal, since appellee's sixth instruction given told the jury that in determining how far each witness is entitled to credit, they might take into consideration his relationship to the parties to the suit.

There is no prejudicial error in this record and the judgment is affirmed.

*Affirmed.*

**Henry C. Montgomery v. J. S. Crain, Administrator.**

CONSIDERATION—*competency of evidence to show actual, given for conveyance.* It is always competent, in an action between parties to a deed, to explain the true consideration therefor.

Assumpsit. Appeal from the Circuit Court of Logan county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

J. L. BEVAN and BLINN & COVEY, for appellant.

F. L. CAPPS and BEACH, HODNETT & TRAPP, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Erasmus D. Beardsley instituted suit in the Circuit Court of Logan county to recover from Henry C. Montgomery damages alleged to be due him (Beardsley) for breach of a contract upon the part of Montgomery to support and care for said Beardsley. The case has been twice tried. After the first trial Beardsley died and J. S. Crain was appointed administrator of his estate. Upon the second trial the jury returned a verdict in favor of the administrator and against Montgomery in the sum of \$941.70, upon which the court rendered judgment and Montgomery appealed.

Deceased having been engaged in trade in Atlanta, Illinois, sold out his business in that city about the year 1875, and being at that time 71 years of age, went to live with appellant, who had married a sister of deceased, upon his farm.

In the issues as closed the claim was made by Beardsley that Montgomery verbally agreed to accept a conveyance of all the right, title and interest of Beardsley in 160 acres of land in Taylor county, Iowa, and a horse, buggy and harness which Beardsley then had, in full payment and discharge for appellant's keeping and maintaining Beardsley during his natural life,

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etc., and that appellant failed to observe the terms of the contract upon his part and turned Beardsley away from his home unprovided for. In such issues appellant denied having made the contract alleged by Beardsley; denied that Beardsley was to simply convey what right, title and interest he had in the land in Iowa; but alleged that Beardsley made a warranty deed to him for the Iowa land; that there had been a breach of the covenant of warranty in said deed and that Beardsley was liable to appellant in the sum of \$500 for damages on account of such breach, which he offered to off-set or recoup against any claim which Beardsley or his estate might have against him.

The evidence discloses that about the time that Beardsley went to live with Montgomery in 1876, he conveyed by warranty deed to Montgomery 160 acres of land in Taylor county, Iowa, with an expressed consideration of \$1,600 although nothing in fact was paid, and also turned over to him an old horse, harness and buggy which was all the property that Beardsley then owned; that there was a defect in the title to the Iowa land and that Montgomery, by paying \$500, purchased the outstanding interest in such land in 1880 and 1881 and thereby secured a perfect title thereto and afterwards traded the Iowa land toward the purchase of a farm in McLean county, Illinois.

It further appears from the evidence that about the first of January, 1903, appellant refused longer to keep Beardsley or provide him a home and as a result thereof he was boarded and cared for by others; that the expenses incurred for his board, care, medical attendance, nursing, etc., after he was so turned away by appellant, amounted to the sum of \$941.70, which amount was allowed by the jury, for which the trial court rendered judgment.

Upon the issues closed the main question in the case was whether the verbal agreement alleged to have been made by and between Beardsley and Montgomery, before Beardsley went to live with Montgomery and be-

fore he made the deed in question, contemplated that Beardsley should merely convey and transfer to Montgomery what property he, Beardsley, then had, or whether such agreement contemplated the making by Beardsley of a warranty deed which, by its covenants, would impose upon Beardsley the duty of meeting the expense necessary to make the title good.

Whether or not there was a verbal contract, and the terms thereof, if any contract was made, were questions submitted to the jury properly as issues of fact. Upon the trial the jury, by their verdict, found that there was a contract or arrangement between Beardsley and Montgomery as claimed by appellee.

Appellant first contends that the evidence does not sustain the verdict and urges a reversal of the judgment upon that account. At the time of the first trial Beardsley was nearly 92 years of age and his memory, to a considerable extent, impaired; but his testimony fairly shows that he understood that he was to turn over to appellant what property he then had, in consideration of which appellant was to keep him and give him clothes as long as he lived and bury him when he died. His testimony shows that he deeded the Iowa land to appellant and himself put the deed on record and delivered all the deeds to the land he had to appellant, and transferred to him a spring wagon, horse and harness in pursuance of such agreement.

A Mrs. Osborne testified that appellant told her in a conversation relating to Beardsley that he, appellant, was to make a home for him; that he got what property Beardsley had and he was to keep him as long as he lived.

William Gibbs testified that he visited the home of appellant once where he saw Beardsley and that in a conversation concerning Beardsley appellant said: "This is his home. He had some property, some land in Iowa, and a little other property and he gave it to us and this is to be his home as long as he lives. When he dies I will give him a decent burial. He is the

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busiest man in Logan county. I can go away from home and come back and feel assured all the chores around will be attended to."

David Layton testified that appellant came to him to see about his taking care of Beardsley and that appellant then said: "He had to take care of him and wanted him taken care of. He said Beardsley gave him a farm in Iowa to take care of him as long as he lived."

Henry C. Hawes testified that appellant said to him that Beardsley had deeded him his land in Iowa and that he was to give him a home. "I think he said as long as he lived."

Appellant testified that he never had any contract with Beardsley; that there was not a word said about keeping him. "I never agreed to take that deed and keep him for the balance of his life and give him burial after he died." He also denied having conversations testified to by the witnesses Osborne, Gibbs, Layton and Hawes. This was in substance all the evidence upon that feature of the case and it seems to fully support the claim that Beardsley turned over to appellant all the property he then had and in return therefor received from appellant a promise to keep him for the balance of his life and bury him decently when he died. Beardsley was about 71 years old when he turned his property over to appellant and his prospect of life then not very long. He became a member of appellant's family, and so remained for a period of over twenty years.

When Beardsley became a greater charge by reason of advanced age, appellant sought to have him cared for by other persons to whom he said that he was willing to pay for such keeping. All these matters are consistent with the claim of appellee and are inconsistent with the claim of appellant that there was no contract between them, or if there was any contract or arrangement, that there was any misunderstanding as to its terms.

Appellant next argues that he should have been allowed to recoup or off-set against the claim of appellee the amount of money which he had to pay to make good the title to the Iowa land which Beardsley conveyed to him by warranty deed.

There was no error, in our judgment, either in the finding of the jury or in the judgment of the Circuit Court in this respect. It is always competent in an action between the parties to a deed to explain the true consideration thereof. *Lloyd v. Sandusky*, 203 Ill. 630; *Howell v. Moores*, 127 Ill. 67. So here it was competent to show that the real consideration was not \$1,600 in cash, but an agreement upon the part of the grantee to do and perform certain acts.

The import of appellant's contentions upon this subject-matter was that he should be allowed to show that notwithstanding his verbal agreement to keep Beardsley as long as he lived he was only bound in law to keep him a part of that time.

If the real consideration for the making of the deed and the turning over of the personal property was a verbal undertaking upon the part of appellant to keep Beardsley as long as he lived, etc., then the verdict of the jury was right. We think the great preponderance of the evidence upon this subject is in favor of appellee's contention and the conduct of appellant seems to corroborate it. Appellant knew nothing of the character of the deed until after it had been recorded when Beardsley delivered it to him with other deeds to the land. He bought the outstanding interest in 1880 or 1881, and so far as the evidence shows never made any demand upon Beardsley to make the difference good, although Beardsley lived in his family after that time for a period of about twenty-three years. Appellant made no claim in this case by set-off or recoupment until the second trial of the case, after the death of Beardsley. He knew when the verbal agreement was made that he was getting all that Beardsley had to give and that Beardsley was there-

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fore insolvent. Appellant's long delay, wholly unexplained, is inconsistent with the claim now made that the real consideration for the deed was \$1,600 and that a breach of warranty can be alleged thereon.

Appellant next contends that the trial court was in error in giving the third instruction for appellee which assumed that by the terms of the verbal contract, if proven as claimed by appellee, Montgomery was to provide Beardsley with medical attendance, nursing, etc. If the jury adopted appellee's version of the verbal arrangement, then the appellant was to keep, make a home for, take care of and clothe Beardsley as long as he lived. The word "keep" is one of broad meaning. Webster defines it as meaning: "To support, to maintain; to supply with the necessaries of life." In the Encyclopedic dictionary it is given the same definition. The evidence tended to show conclusively that appellant was to keep and take care of Beardsley for the remainder of his life, and if he was, then Beardsley's necessary medical care and nursing were included in those general terms and the court was not in error in so instructing the jury.

Appellant also contends that there was error in the admitting of testimony as to the value of the services of nurses who cared for Beardsley in his last illness; but the evidence seems to have been sufficient to show that the services rendered were worth all that was claimed for them and that the persons who testified as to the value of such services had had enough experience in that line to make their opinions competent evidence.

The judgment was right and is affirmed.

*Affirmed.*

**Springfield Consolidated Railway Company v. Jennie Blakesley.**

**VERDICT**—when not disturbed as against the evidence. A verdict not manifestly against the preponderance of the evidence will not be disturbed on review.

Action in case for personal injuries. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed on *remitititur*. Opinion filed June 1, 1907.

WILSON, WARREN & CHILD, for appellant.

PATTON & PATTON and JOHN C. SNIGG, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Jennie Blakesley brought suit in the Circuit Court of Sangamon county to recover damages sustained by her in an accident alleged to have been caused by the servants of the railway company in the negligent and improper management of one of its street cars. Blakesley recovered a judgment for \$2,500, from which the railway company has appealed.

It appears from the evidence that appellee was driving her horse, hitched to a two-seated surrey, west on Cedar street in the city of Springfield, Illinois, in the month of November, 1905; that she had with her several lady friends and a boy about three years old; that one of appellant's cars was going west upon the same street in the rear of appellee's surrey; that appellee's horse took fright, ran away, threw the occupants out upon the ground and injured appellee. The negligence alleged against appellant was that those in charge of the car unnecessarily, continuously and negligently sounded the gong on the car, in the immediate rear of the surrey, from which action the

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horse took fright and ran away, causing the injury sued for.

Upon the question of negligence the main controversy was whether or not the gong was unnecessarily and repeatedly sounded; whether or not the horse took fright from the sounding of the gong; whether the car, with its gong sounding, passed the horse and surrey while the horse was frightened and likely to run away, or whether at that time the horse was under apparent control. Upon every one of all these questions there was a sharp conflict in the evidence. Upon the part of appellee seven witnesses testified to some one or all the incidents connected with the ringing of the bell, the fright of the horse and the relative position of the car to the surrey and its occupants, while upon the part of appellant five witnesses testified concerning matters immediately connected with the conduct of those in the surrey, the action of the horse and the management of the car, and four others gave testimony tending to impeach some one or more of the witnesses for appellee.

Under such circumstances it is the peculiar province of a jury to determine what witnesses are telling the truth, and what ones should not be believed. Human testimony cannot be weighed or estimated by any mathematical process. Tested by the rules that govern courts of review in all cases where every fact material to a determination of the case is in sharp conflict and by rules which are not in serious dispute in this case, we hold that the verdict was not against the manifest weight of the evidence, and should not be set aside upon that ground.

We are disposed to think that the damages as fixed by the judgment in the sum of \$2,500 are excessive and should be reduced to the sum of \$1,500. If appellee, within thirty days from the date of filing this opinion will remit the sum of \$1,000, from the recovery, the judgment of the court below will be affirmed in the

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sum of \$1,500, otherwise it will be reversed and remanded.

*Affirmed on remittitur. Remittitur filed and judgment affirmed.*

Motion of appellee to tax cost of additional abstract to appellant allowed.

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#### Springfield Consolidated Railway Company v. Nellie Bell.

1. ARGUMENT OF COUNSEL—*when impropriety in, will reverse.* It is seldom that judgments have to be reversed because of improper language in argument to the jury and courts of review take such action with hesitation and reluctance, yet in clear cases they will and should reverse, because of improper remarks to the jury.

2. ARGUMENT OF COUNSEL—*what ground for reversal.* Upon the second trial of a cause it is improper to inform the jury as to the result of a previous trial, and where this is done in a case close upon the facts, a reversal will follow.

Action in case for personal injuries. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

WILSON, WARREN & CHILD, for appellants.

STEVENS & STEVENS and C. F. MORTIMER, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Nellie Bell brought suit in the Circuit Court of Sangamon county against the Springfield Consolidated Railway Company to recover damages alleged to have resulted to her from the negligence of the servants of the railway company. There were two trials had, on the first of which there was verdict in favor of Bell in the sum of \$1,500, which was set aside by the court on motion for a new trial. On the second trial there

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was a verdict returned in favor of Bell in the sum of \$1,250 on which the court rendered judgment, from which the railway company has appealed.

Several errors have been assigned by appellant, but in the view we take of the case it is necessary to discuss only one of them and that one relates to the impropriety of the action of appellee's attorney in stating to the jury what the former verdict was.

It appears from the record that counsel for appellee, in his closing address to the jury used the following language: "If this woman is lying to you she has hoodwinked all her friends; she has hoodwinked the Clarks; she has hoodwinked the doctor and her attorneys; she has hoodwinked this jury and she has hoodwinked another jury before you." This was in effect telling the jury plainly that the verdict upon the former trial was in appellee's favor. If the case was not close upon the facts and the court could see from an inspection of the whole record that no harm resulted from such action of counsel, we would not reverse the case upon the ground of improper conduct, but where a case is extremely close upon the evidence and plaintiff's right to recover a very doubtful one, such conduct cannot be said to be free from prejudice and should not be excused.

That this case was of the latter type is quite apparent from an inspection of the record. Appellee upon her part called seventeen witnesses, while appellant called fully as many. Not only was the injury itself, and its character, sharply disputed and much in doubt, but appellee's reputation for truth and veracity was seriously questioned, while one witness, seemingly disinterested and not disputed by any one except appellee, testified that he alighted from the car in question at the same time that appellee did and that she neither fell nor was thrown from the car, but left it in apparent safety.

If the case had been submitted to the jury upon the evidence fairly, and a like verdict returned, appellee

could well have argued that it was the province of the jury to say where the truth lay and that a court of review should not reverse under such circumstances; but since the evidence was close and conflicting and the case doubtful upon its merits, we hold that the remarks employed by counsel for appellee were so prejudicial in their character as to necessitate a reversal of the judgment.

It is seldom that judgments have to be reversed upon this ground alone and courts of review take such action with hesitation and reluctance, yet in clear cases they will and should reverse, because of improper remarks to the jury. North Chicago Street Railway Co. v. Cotton, 140 Ill. 486-502. In Illinois Central Railroad Company v. Seitz, 111 Ill. App. 242, this court said: "Verdicts obtained by the use of improper language generally are and always should be short lived. Trial courts should set them aside as often as they are obtained."

If an attorney states to the jury prejudicial matters that have no proper place in the case, he jeopardizes the interest of his client and can expect only an uncertain verdict to be returned in his favor, which the court will not hesitate to set aside.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

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Russell & Company v. John McGirr et al.

The Russell & Company v. John McGirr.

Consolidated for Hearing.

1. **VERDICT—how may be rendered.** A verdict may be rendered either orally or in writing.

2. **INSTRUCTIONS—when assignment of error with respect to, will not be considered.** Instructions claimed to have been improperly refused will not be reviewed on appeal where the abstract does not show the instructions given.

Judgment by confession. Appeal from the County Court of Cham-

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Russell & Co. v. McGirr.

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paign county; the Hon. F. M. SHONKWILER, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

C. R. JUNGERICH and MANFORD SAVAGE, for appellants.

D. J. CARNES, for appellees.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Russell & Company and The Russell & Company, two different corporations of Massillon, Ohio, having a common interest in the subject-matter involved in this proceeding, entered two judgments by confession in the Circuit Court of Champaign county against John McGirr and John H. Nelson of DeKalb county, one in the sum of \$477.45 and the other for \$496.40 and costs. On motion and affidavits said judgments were opened and leave given to McGirr to plead. Plea and notice of special matters in defense were filed by McGirr and the two causes were, by agreement, consolidated and submitted to a jury who found the issues in favor of McGirr. The court overruled a motion for a new trial and rendered judgment in favor of McGirr. Russell & Company and The Russell & Company appealed.

It appears from the evidence that McGirr was agent for appellants in the sale of their goods at DeKalb, Illinois, and that as such agent he, and one Beechley, also an agent or salesman of appellants, sold some machinery to Nelson for which he, Nelson, gave his promissory notes which McGirr signed (as a joint maker with Nelson as claimed by appellants, or as a guarantor as claimed by McGirr) and that said notes were secured by chattel mortgages made by Nelson to appellants; that while the chattel mortgages were in full force and during the fall of 1904, Nelson's barn was burned and a part of the property he had mortgaged to appellants, besides other property, was destroyed;

that the property burned was covered by insurance taken out by Nelson with loss payable to appellants. It also appears that soon after the fire Nelson wrote appellants advising them of the loss, and asked them "to send Beechley so they could have some kind of a settlement;" that in response to this invitation Beechley was sent to the home of Nelson, where he and Nelson made an adjustment, as claimed by Nelson, and thereupon Nelson turned over to Beechley the insurance policy which was estimated to be worth, by reason of the fire, \$890, all the property not burned, covered by the chattel mortgage (except a span of mules), and a corn shredder, not covered by the chattel mortgage, and paid Beechley in cash \$502. The policy of insurance was afterward duly assigned to appellants who have ever since retained the same without in any way offering to return it to either Nelson or McGirr. Soon after the time that Beechley took possession of the property he advertised a chattel mortgage sale in the name of appellants, and bid in the property in their name for the sum of \$350.

The main question involved is whether or not what took place at Nelson's home, while Beechley was there, was a full and final settlement between Nelson and appellants or whether Beechley merely accepted what he got from Nelson to apply upon the indebtedness, which, as it is now accounted for by appellants, leaves a balance due upon the notes for which McGirr would be liable.

Upon a consideration of the whole evidence we are fully satisfied that the jury were warranted in finding that there was a full settlement between the parties and that McGirr was thereby released.

Nelson testified that he purchased a part of the machinery through Beechley (who was at the time at McGirr's office in DeKalb); that his barn burned in the fall of 1904, and as he had to vacate the farm he was on by the first of March following, he wrote to appellants to send Beechley there that they might settle;

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that Beechley came and they figured the whole matter up; that they called the insurance policy worth \$890, estimated an engine and sheller covered by the mortgage at \$380 and a shredder which was not in the mortgage at \$200, and that he then paid Beechley in cash \$502, which was a total of \$1,972.

McGirr testified that Beechley said to him, when he was on his way to Nelson's, that he had come to make a settlement with Nelson; that Beechley came back on the next day from Nelson's and said that it was fortunate for him, McGirr, that Nelson was in as good shape as he was; that Nelson's machinery would have to bring \$350 and that he had settled with Nelson.

Beechley testified that when he went to Nelson's place they made a calculation as to what Nelson's indebtedness was and also estimated the value of what Nelson was willing to turn over to appellants and that what he turned over, as estimated, exceeded in value, to a small extent, the amount of his indebtedness, but says there was no understanding that appellants were to accept the property in full of the debt; that it was an estimate only. Beechley also denied that he said to McGirr that he had settled with Nelson and denies that Nelson claimed to him that there was any final settlement.

George H. McCall, who had charge of the collection department of appellants, claimed for them and testified that Beechley had no authority to make any settlement with Nelson in the manner claimed by Nelson. This claim of McCall, however, seems clearly against the preponderance of the evidence. It is admitted that Beechley sold for appellant to Nelson some of the very machinery involved in this controversy. Beechley did not testify that he had no authority to settle with Nelson, while the fact that he was there under the circumstances would suggest that he was there by authority of appellants. McCall admits in his evidence that Beechley was appellant's salesman and was authorized to solicit and assist local agents in selling, but says

he was not authorized to make settlement unless especially instructed *in writing* to do so. There is no claim made that Beechley's authority *to sell* was in writing and no good reason is made to appear why he should need authority in writing to make a settlement. He went to Nelson's in response to an invitation from Nelson to appellants to send him there to make settlement and his authority to do so cannot now be successfully denied by appellants.

Appellants next contend that McGirr was a signer upon the notes involved with Nelson and not a guarantor, as claimed by appellee. Upon the showing made, we are disposed to hold that McGirr was a guarantor only, but in view of the fact that our holding supports the jury and the trial court to the effect that there was a final settlement between Nelson and appellants through Beechley, we are not called upon to discuss the distinction that appellants urge upon that score.

Appellants also contend that there was error in the action of the court in receiving the verdict after the jury had been discharged, and in not having the same properly signed by all the jurors. There is nothing, however, in the abstract showing that the verdict was received in the absence of the jury or any of them, or that the jury had been discharged or were not in attendance upon the court when the verdict was received. The verdict was in proper form and could have been rendered orally as well as in writing. This assignment of error is without merit under the showing made.

Appellants next assign as error the refusal of the court to give for appellants certain instructions offered by them. The court gave for appellants fifteen instructions and refused twenty-three others. The court also gave for appellees four instructions. Of all these instructions so given and refused, appellants have abstracted only ten refused instructions offered by appellants and one of the four given for appellee. We are not called upon to review a partial abstract of the

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Baird v. The People.

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instructions as the errors alleged in that respect may have been entirely harmless in view of the instructions given that are not abstracted.

The judgment is right upon the merits and is affirmed.

*Affirmed.*

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**Newton M. Baird v. The People of the State of Illinois.**

**CONTEMPT**—*when answer entitles respondent to discharge.* In proceedings for criminal contempt, except in those cases where the contempt is committed in the presence of the court, if the respondent's answer is sufficient to acquit, he must be discharged.

Criminal prosecution for contempt. Error to the Circuit Court of Montgomery county; the Hon. TRUMAN E. AMES, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

F. K. DUNN, for plaintiff in error.

Wm. H. STEAD, Attorney-General, and L. V. HILL, for defendant in error.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Newton M. Baird, the sheriff of Coles county, was cited to appear in the Circuit Court of Montgomery county and show cause, if any he have, why he should not be adjudged guilty of contempt of court and punished therefor. Baird appeared and filed his affidavit and that of one Ira Powell, in his defense. Affidavits were also filed by the defendant in error and upon a hearing Baird was adjudged guilty of contempt for not having promptly served an attachment writ upon a witness in said Coles county and fined \$50. Baird prosecuted a writ of error.

Plaintiff in error, by his affidavit, denied specifically all the material facts and circumstances which, in the

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information filed, were alleged to constitute the contempt.

This proceeding is criminal in character, not remedial. In proceedings for criminal contempt, except in those cases where the contempt is committed in the presence of the court, if the contemnor's answer is sufficient to acquit, he must be discharged. Oster v. People, 192 Ill. 478; Loven v. People, 158 Ill. 159-167. The same question was before this court in the case of Longenbook v. The People, 130 Ill. App. 320. The holding there announced is decisive of this case.

The judgment is reversed and the cause remanded.  
*Reversed and remanded.*

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**Commissioners of Spoon River Drainage District v.  
John P. Connor et al.**

JURY—*when discharge of, vitiates verdict.* The discharge of a jury before their verdict has been received vitiates the verdict when returned, and this notwithstanding an agreement by the parties that the jury may seal their verdict and separate.

Petition to annex lands to drainage district. Appeal from the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

RAY & DOBBINS, for appellants.

JOHN A. REA and ALBERT E. BERGLAND, for appellees.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

The Commissioners of Spoon River Drainage District of Champaign county filed their petition in the County Court of that county to attach the lands of appellees to the said district claiming that the same naturally drained into the ditches of the district and

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the owners of said land had tiled the same and drained into said district and that said lands were benefited by the outlet so furnished. The cause was heard in the County Court and appeal taken from that court to the Circuit Court of said county where the case was again tried. There was a finding in the latter court that none of the lands of the appellee would be or were benefited by the drain as claimed by the commissioners, from which finding the said drainage district has appealed.

Appellants assign as error that the verdict was not properly returned by the jury into court, and as we regard that error one of such gravity as to make a reversal imperative, we do not discuss any of the other errors argued.

From the record it appears that when the jury were about to retire on April 27, 1906, to consider their verdict, the following entry upon the record was made by the trial court: "By agreement it is ordered that when the jury shall agree upon their verdict they may sign and seal same and deliver it to the bailiff in charge and separate." Thereafter the court, of its own motion, and without any stipulation warranting it, made the following entry upon the record: "Ordered that said jury be thereafter discharged for the term."

On the next day, April 28, 1906, the jury having agreed and having separated and also having been discharged for the term by previous order, the court, in the absence of the jury, received their verdict, delivered by the bailiff, and treated the same as a verdict in the case.

The agreement that a jury may seal their verdict and separate does not dispense with their attendance upon the court when their verdict is returned into open court. Either party has a right to poll the jury, and if they be discharged for the term, before their verdict is so returned, this privilege is lost. It is a fatal irregularity for the judge to discharge the jury from further service before they have returned their ver-

dict, unless he has the consent of the parties. Bond v. Wood, 69 Ill. 282.

In St. L., V. & T. H. R. R. Co. v. Faitz, 19 Ill. App. 90, the court say: "This right to have the jury examined by poll is a legal one, of which the parties cannot be deprived without their consent; and an agreement that the jury may seal their verdict and separate does not dispense with their attendance when the verdict is received."

The judgment is reversed and the cause remanded.  
*Reversed and remanded.*

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**Gus Katz v. Lu N. Davis et al.**

FINDINGS OF MASTER—*when action of court in setting aside, will be reversed.* Where the findings of the master appear to have been sustained by the evidence heard by him, the action of the court in sustaining exceptions to such findings will be set aside on review.

Foreclosure. Appeal from the Circuit Court of DeWitt county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

O. E. HARRIS and LEMON & LEMON, for appellant.

INGHAM & INGHAM, for appellee, Anna R. Finfrock.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Lu N. Davis filed a bill in the Circuit Court of DeWitt county to foreclose a mortgage against Charles F. Finfrock and Anna R. Finfrock, his wife. Gus Katz, a judgment creditor of said Charles F. Finfrock, intervened and by petition sought to have the interest of both Charles F. Finfrock and Anna R. Finfrock in the mortgaged premises subjected to sale under the mortgage, and his judgment lien satisfied out of the proceeds of the interest of said Charles in the

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mortgaged premises, in excess of one-half of the mortgage debt; said Anna filed a cross-bill asking that the whole of the mortgage debt be paid from the proceeds of the sale of the one-half of the mortgaged premises belonging to the said Charles alleging that the mortgage debt was the individual debt of said Charles and not the debt of said Anna. There was a decree directing sale to be made as prayed for in the cross-bill of said Anna R. Finfrock and Katz appealed.

Upon the issues so made, upon the bill of Davis, petition to intervene by appellant and cross-bill of appellee, the cause was referred to the master in chancery, who took and reported the evidence together with his conclusions to the court. The master found that upon the purchase of forty acres of land, the said Anna R. Finfrock and Charles F. Finfrock became indebted, on February 4, 1892, and to pay such indebtedness gave a note to the Waynesville Bank, and to secure its payment gave the mortgage upon the land in question; that there was due on the note \$2,385; that the note was assigned to Lu N. Davis; that there was due the intervenor Gus Katz, the sum of \$2,024.93 on his judgment; that Anna R. Finfrock and Charles F. Finfrock were each the owner of an undivided one-half of the premises involved; that said note owned by Davis was the joint indebtedness of both Anna R. Finfrock and Charles F. Finfrock; that the \$2,000 obtained on the note and mortgage was used to pay one Elizabeth K. Bell, from whom said Finfrocks bought said land, a portion of the purchase price of the premises. That the entire premises should be sold and the proceeds applied first to the payment of the mortgage indebtedness to Lu N. Davis; that one-half of the remainder of the proceeds be paid to Anna R. Finfrock and the other half to the payment of the judgments in favor of Katz, and if any surplus, that it be paid to Charles F. Finfrock, and that the value of said land was \$150 per acre.

Objections were heard by the master and overruled.

Exceptions to the master's findings were afterwards argued before the court who sustained the exceptions and rendered a decree directing that the undivided interest of the defendant Charles F. Finfrock in said premises be first exposed for sale, and if his interest in said premises should fail to sell for enough to satisfy the mortgage debt, interest and costs, then, in that event, the interest in said land of the defendant, Anna R. Finfrock, or so much thereof as might be necessary, be exposed for sale to make up the deficiency, if any, and that the intervening petition be dismissed for want of equity, at cost of petitioner.

The main question is whether the note made by Finfrock and his wife was for the individual indebtedness of the husband as claimed by Anna R. Finfrock, or was for the debt of both of them. The master found that the note represented the joint debt of said Charles and Anna Finfrock, and a careful examination of the record satisfies us that this finding was correct and should have been approved by the trial court.

The undisputed evidence shows that the mortgaged premises were conveyed on February 4, 1892, by Elizabeth K. Bell and husband to Charles F. and Anna R. Finfrock, jointly, for the sum of \$3,000; that on the same date the note in question was made and given to the Waynesville Bank for the sum of \$2,000, signed by both said Charles and Anna Finfrock, and that the bank at the same time issued to said Elizabeth K. Bell a draft for \$2,000 upon a bank in Chicago, and that the note was afterwards sold by the bank to said Davis. Simultaneously with the making of the note the Finfricks executed the mortgage in question, upon the premises so bought, to secure the note.

The note executed was a joint note, yet Anna R. testified that she signed it as the surety of her husband, and that she had no part of the funds obtained from the bank and did not know who received it. She admits, however, that she and her husband bought the land together and that he attended to the business for

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both of them. She made no effort at all to show that the \$2,000 paid to Mrs. Bell came from any source other than the bank to which the note was made, nor to show that she ever paid anything toward the purchase of the land.

It is clear that Anna received title to the undivided one-half of the mortgaged premises without paying anything directly therefor and that in the procuring of that conveyance to herself the note and mortgage were executed to secure the unpaid purchase price. The joint interest in said premises of both Charles and Anna should be subjected to the lien of the mortgage.

The decree is reversed and the cause remanded with directions to the court below to overrule the exceptions to the master's report and enter a decree upon the master's findings.

*Reversed and remanded with directions.*

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#### City of Lincoln v. Henry Heinzel.

1. INSTRUCTIONS—*upon duty of city with respect to streets, erroneous.* An instruction which makes the city liable in case "the inlet used by the city was not ordinarily safe for horses passing along by the same on the pavement," is erroneous in that it requires more than the exercise of that degree of care required by law.

2. INSTRUCTION—*when error in, not cured by others given.* An error in an instruction is not cured by a correct statement of the law in another instruction given.

Action on the case. Appeal from the Circuit Court of Logan county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

WALLACE & BECKERS, for appellant.

HUMPHREY & ANDERSON, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Henry Heinzel, by his next friend, brought suit against the city of Lincoln to recover damages claimed by Heinzel to have resulted from the alleged negligence of said city in the construction of one of the intakes, connecting with the sewer system of said city, by means whereof a horse belonging to said Heinzel was injured. There was a verdict and judgment in favor of Heinzel in the sum of \$110, and the city appealed.

Appellee was riding his horse upon one of the public streets of appellant, when, it is claimed, the horse slipped upon the pavement and so fell that one of his hind legs was thrust into the mouth of the intake, and while attempting to arise, the horse broke his leg and was so badly injured that he had to be killed. The intake was set in a concrete curb and was so constructed that it had an opening which was twenty-two inches long and five and one-fourth inches high, the lower edge of which opening was about on a level with the pavement adjoining it. Appellee claims that the intake was negligently constructed in not having any bars or fingers across the opening or mouth thereof to prevent, or guard against, the happening of an accident or injury of the kind involved.

Appellant contends that the intake was of the most modern pattern and was approved by men skilled in the use of such appliances. The evidence was conflicting and the question was a very close one whether or not the using of the intake described by the city was such negligence upon its part that appellee should be allowed to recover. In such a case it is important that the jury be accurately instructed. *Buckler v. City of Newman*, 116 Ill. App. 546; *Morris. v. Coombs*, 109 Ill. App. 176.

Upon the trial appellee asked, and the court gave the following instruction:

"The court instructs the jury that if you believe

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from the evidence and from what you saw that the inlet used by the city at the place of injury is not ordinarily safe for horses passing along by the same on the pavement, then, even if you believe this form of inlet is used by other cities and towns in a similar case, that would not prevent the city being liable in this case, if the plaintiff has proved by a preponderance of the evidence that said horse was injured as alleged in the declaration and that he was in the exercise of due care and caution himself."

This instruction was erroneous in making the city liable in case "the inlet used by the city was not ordinarily safe for horses passing along by the same on the pavement." A city is only required to use reasonable care and diligence to keep its streets in a reasonably safe condition and repair for travel. *City of Rock Island v. Gingles*, 217 Ill. 187.

Appellee contends, however, that his error was overcome by the giving of instructions for appellant in which the correct rule was stated.

It is true that some of appellant's instructions given stated the rule correctly; yet, as the degree of care which the city was called upon to exercise was the material proposition of law involved in the case, it was error to give an instruction for appellee which told the jury that appellant was liable if the inlet was not ordinarily safe, instead of imposing upon it the duty only of using reasonable care in that regard.

It is error to give instructions which contradict each other as to material propositions of law in a case. *C. & A. R. R. Co. v. Henline*, 120 Ill. App. 134.

For the reasons given the judgment will be reversed and the cause remanded.

*Reversed and remanded.*

**Cleveland, Cincinnati, Chicago & St. Louis Railway Co.  
v. Lucius B. Bacon et al.**

1. COMMON CARRIER—*propriety of excluding shipper's contract from jury.* Upon this question the decision of the court is controlled by the ruling in *C., C., C. & St. L. Ry. Co. v. Pinnell*, *post*, p. 571, to which reference is made.

2. COMMON CARRIER—*what does not relieve, from liability.* Where the contract for shipment is one for through carriage, relief from liability cannot be obtained by showing that the negligence charged was that of a connecting carrier.

Action on the case. Appeal from the Circuit Court of Edgar county; the Hon. J. W. CRAIG, Judge, presiding. Heard in this court at the May term, 1905. Reversed and remanded. Opinion filed June 1, 1907.

GEORGE F. McNULTY, for appellant; C. S. CONGER and R. L. MCKINLAY, of counsel.

J. W. HOWELL, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Lucius B. Bacon and Milton Mills brought suit against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company in the Circuit Court of Edgar county to recover damages for an alleged failure of the railway company to transport within a reasonable time eighty head of fat cattle from Ridge Farm, Illinois, to Union Stock Yards in Chicago. There was a verdict in the Circuit Court below in favor of Bacon and Mills in the sum of \$450, upon which the court rendered judgment. The railway company has appealed.

In this case the question is presented whether or not the trial court was in error in refusing to allow a shipper's contract in writing, containing limitations or restrictions in favor of the carrier, to go to the jury when there is any evidence tending to show that the shipper knew of the contents of the agreement or assented to its terms.

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The precise question was before this court in the case of C., C., C. & St. L. Railway Co. v. Pinnell, *post*, p. 571, where such action of the court was held to be error. The holding there is decisive of this case and renders a reversal necessary.

The further question is presented whether or not it was error for the court to refuse to allow appellant to prove after it had received the cattle from appellee that appellant notified the C. & E. I. Railway Company, its connecting carrier at Danville, Illinois, that such cattle were en route and when they would arrive in Danville and that the latter railway company refused to hold its Chicago stock train there to receive such cattle and convey them promptly to their destination. The bill of lading involved was a through bill from Ridge Farm to consignee in care of Clay, Thompson & Company, Chicago, and the shipper was in no way responsible for the selection of the connecting carrier. This question is practically identical with that recently determined by this court in the case of Wabash Railroad Co. v. Thomas, 122 Ill. App. 569-570, affirmed in 222 Ill. 337, where it was held that the carrier, under such a contract, could not relieve itself from liability by showing a mere delivery to a connecting carrier.

For the error indicated the judgment is reversed and the cause remanded.

*Reversed and remanded.*

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**Illinois Central Railroad Company v. Fred Collison, Administrator.**

1. **ORDINANCE—*how proof of, may be made.*** The ordinance of a village may *prima facie* be established by the certificate of the clerk of the village made under the seal of the corporation.

2. **ORDINANCE—*how prima facie proof of, cannot be overcome.*** The *prima facie* proof of an ordinance cannot be overcome by the introduction of the recorded copy of such ordinance.

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3. ORDINARY CARE—*when instruction limiting inquiry with respect to, error.* Where there was no eye-witness to the accident which resulted in death, it is error to limit the jury upon the question of ordinary care to a consideration of what the deceased was doing at the *instant* of time when he received the injury.

4. ORDINARY CARE—*propriety of instruction with respect to instinct of self-preservation.* Where there was no eye-witness and the accident resulted in death, it is proper to permit the jury to consider upon the question of ordinary care the instincts of men which naturally lead them to avoid injury and preserve their lives.

5. ORDINARY CARE—*when instruction as to erroneous.* It is error in an instruction to recite that certain facts tend to show the exercise of ordinary care.

6. INSTRUCTION—*must not be argumentative.* An instruction should not be argumentative and if argumentative is ground for reversal where prejudice results.

Action in case for death caused by alleged wrongful act. Appeal from the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

CLOUD & THOMPSON, for appellant; JOHN G. DRENNAN, of counsel.

F. M. and H. I. GREEN and W. M. ACTON, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Fred Collison, as administrator of the estate of Harry Collison, deceased, brought suit in the Circuit Court of Champaign county against the Illinois Central Railroad Company, charging said company with negligence in the running and management of its trains by means whereof said Harry Collison was struck by a passing train and killed. There was a verdict and judgment in favor of the administrator, and the railroad company appealed.

The negligence alleged against appellant, in substance, was that it ran a passenger train through the village of Thomasboro at an excessive and dangerous rate of speed, *i. e.*, from forty to sixty miles per hour,

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at a time when another train of appellant was approaching its depot platform in such village for the purpose of stopping to receive passengers, upon another track only a few feet from the one on which the swift train was running; that there was an ordinance in said village limiting the rate of speed of passenger trains through said village to not more than fifteen miles an hour; that deceased was to become a passenger upon the train that was then about to stop at said platform to receive passengers and, while he was in the exercise of due care, said swift train was so negligently and carelessly run by the servants of said company and at such an excessive and dangerous rate of speed that said Harry Collison was struck by said swift train and killed.

The evidence shows that deceased had transacted business in the village of Thomasboro during the day of December 26, 1905, and was about to take a train for his home in Rantoul at the time he was killed; that very shortly before his death he left the store of an acquaintance and went west upon a walk which led across a side track and two main tracks of appellant to a depot west of all three tracks; that the westerly one of the two main tracks was used by south-bound trains while the other main track was used by north-bound trains; that the distance between the west rail of the north-bound track and the east rail of the south-bound track was only a little over ten feet, and that between those rails there was a platform six feet wide used by passengers in getting upon and off the cars; that deceased intended to take a train going north, which would require him to cross the side track and the easterly main track to reach the platform between the main tracks; that at about the time he reached the tracks or platform, a train was approaching slowly, going north, on the east main track, while another train, which was the cause of the accident, was running south on the west main track at the speed of from forty to sixty miles per hour.

It is not clear whether deceased had reached the depot platform west of all three tracks and was attempting to return to the platform between the two main tracks to take his train going north and was killed while trying to cross the west main track, or whether he, fearing to remain on the narrow platform between the two main tracks, was struck while crossing the west main track to avoid the danger incident to his remaining on the narrow platform between such trains.

The evidence tends strongly to show that there was no eye-witness to the accident and, therefore, the exact manner or way in which Collison lost his life was a matter of deduction to be drawn from all the surrounding circumstances. The jury adopted the view that deceased was in the exercise of due care and was lawfully upon the premises of appellant; that the railroad company was guilty of negligence in running its trains, under the circumstances shown, at an excessive and dangerous rate of speed, and in accordance with such view returned a verdict finding appellant guilty.

We do not care to review the different theories discussed by counsel relating to the manner in which Collison was killed, as the case must be reversed upon other grounds, and as it will be again tried, a review of the evidence upon that subject could be of no avail.

Appellant contends that the court erred in admitting in evidence an ordinance of the village of Thomasboro regulating the speed of trains within the corporate limits. The disputed ordinance, by its terms, limited passenger trains to a speed not exceeding fifteen miles an hour through said village. When offered in evidence the ordinance was certified to by the village clerk as follows:

“STATE OF ILLINOIS,  
County of Champaign, } ss.  
Village of Thomasboro.”

“I, Charles Condit, Village Clerk of the village of Thomasboro, a municipal corporation in the county of

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Champaign and state of Illinois, do hereby certify that I am the keeper of the records and ordinances of the said village, and that the foregoing is a true and complete copy of ordinance No. 11, section 28, of the ordinances of said village of Thomasboro; that the said ordinance was duly passed and adopted by the board of trustees of the said village of Thomasboro at a regular meeting thereof on November 2, 1903; that the same was signed and approved by E. C. Saddoris, then president of the said board of trustees and of said village of Thomasboro; that copies of said ordinance were duly posted in three public places in the said village of Thomasboro on November 5, 1903; all as appears from the records and files of my said office. In witness whereof I have hereunto affixed my signature as village clerk of the village of Thomasboro, Illinois, and have caused to be affixed the seal of the said corporation of the said village of Thomasboro.

[L. S.]                   CHARLES CONDIT, Village Clerk.  
Attest: CHARLES CONDIT, Village Clerk.

March 3, 1906."

Objection was made to the introduction of the ordinance upon the ground that there was no evidence to show that such ordinance had been signed by the president of the village board, or that it had been posted as required by law. Section 66 of chapter 24 of the Revised Statutes, provides that all ordinances of a city or village, and the date of publication, may be proven by the certificate of the clerk, under the seal of the corporation. The certificate of the clerk above quoted, under the village seal, covered both features of the objection made and seemed to have been a full compliance with the requirements of said section 66, and to have entitled the copy offered to be admitted as *prima facie* evidence of the passage, signing and posting of the ordinance.

Appellant afterward, upon its part, offered the recorded copy of the ordinance to show that it had not been signed by the president and thus overcome the *prima facie* case made by the certificate of the village

clerk to the effect that the ordinance had been duly signed, but the court properly ruled this offer to be incompetent. The original draft of the ordinance may have been signed by the president of the village board in due form as certified by the clerk and yet the *recorded* copy, through error, not bear a copy of his signature. There was no error on the part of the court in this regard and the ordinance was properly admitted in evidence under the showing made. C. & A. R. R. Co. v. Wilson, 225 Ill. 50.

Appellant next contends that it was error to give for appellee the following instruction:

"The court instructs the jury that the plaintiff is not required to produce direct and positive testimony showing just what deceased was doing at the instant he received the injury that caused his death; that the law requires only the highest proof of which the particular case is susceptible, and the jury may take into consideration, with other facts, the instincts which naturally lead men to avoid injury and preserve their own lives, in determining whether or not deceased, Harry Collison, was using ordinary care for his own safety at the time he was injured."

Two objections are urged against such instruction, viz., that by it plaintiff was not required to show what deceased was doing *at the instant* he received the injury, as bearing upon the question of due care, and by it, also, the jury were instructed that they could take into consideration the instincts which naturally lead men to avoid injury and preserve their lives. The former of such objections is well taken. It has been held repeatedly to be error to limit the inquiry in the matter of time, when a party injured should be in the exercise of due care, to any exact instant. L. S. & M. S. Ry. Co. v. Hession, 150 Ill. 546; I. C. R. R. Co. v. Kief, 111 Ill. App. 354. In this respect the instruction tended to mislead the jury.

The other objection, however, we do not regard as tenable, as under all the evidence the jury were warranted in believing that there was no eye-witness to the

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accident. In such event there is no objection to telling the jury they may consider the instincts of men, which naturally lead them to avoid injury and preserve their lives, in determining whether or not ordinary or due care was exercised. I. C. R. R. Co. v. Norwicki, 148 Ill. 29-35; C., B. & Q. R. R. Co. v. Gunderson, 174 Ill. 495-498; Ill. Cent. R. R. Co. v. Prickett, 210 Ill. 140.

Appellant next assigns as error the giving of the sixth instruction for appellee, which was in the following words:

“The court instructs the jury that in this case, in determining whether or not the deceased, Harry Collison, used due care to avoid the injury which is alleged by the declaration to have caused his death, it is your right and your duty to take into consideration and carefully weigh all the facts and circumstances appearing from the evidence to have surrounded him at the time of the accident; it is proper for you to consider the number of trains which were at or approaching to the place of the injury at the time thereof, if shown by the evidence, the buildings on the right of way at and near the place of the accident, if shown by the evidence, the speed at which the train or trains at such location were moving, if shown by the evidence, the purpose for which the deceased went upon the right of way and tracks of the defendant company, if shown by the evidence, the platforms and crossings provided for use by patrons of the company at and near the place of the accident, as shown by the evidence; and it is right and proper for you to consider all other facts and circumstances which the evidence may disclose tending to show the care or caution exercised by the deceased to prevent injury to himself, if any such appears from the evidence, and if, after considering all the facts and circumstances in evidence before you, you believe that the deceased acted as an ordinarily prudent and cautious man would have acted under the same or like circumstances to avoid injury to himself, and if you believe from the evidence in the case that the deceased did use due care and caution for

his own safety, and that he was injured by reason of the negligent acts of the defendant as complained of in the declaration, if you believe from the evidence the defendant was negligent as so complained of in the plaintiff's declaration, while he, the plaintiff, was in the exercise of due care for his own safety, then, in that event of the proof, your verdict should be for the plaintiff and you should assess his damages at such amount as you may determine from the evidence the widow and next of kin of the deceased have sustained, if any."

This instruction was too long, very argumentative, and assumed that the matters therein recited tended to show care upon the part of deceased to avoid the injury and was so prejudicial to the case of appellant as to make a reversal necessary.

The judgment is reversed and the cause remanded.  
*Reversed and remanded.*

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### Elijah Jennings v. Donald Legg.

**VERDICT**—when not disturbed as against the evidence. A verdict based upon close and conflicting evidence will not, in the absence of errors of law, be disturbed on review.

**TRESPASS.** Appeal from the Circuit Court of Edgar county; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

F. C. VAN SELLAR, for appellant; H. VAN SELLAR, of counsel.

FRANK T. O'HAIR and F. W. DUNDAS, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Elijah Jennings brought suit in trespass against Donald Legg, in the Circuit Court of Edgar county, to recover damages for an injury alleged to have been

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inflicted upon his, Jennings', person by Legg. Upon a trial, the jury returned a verdict of not guilty, upon which the court rendered judgment against Jennings and he appealed.

Appellant contends that the verdict was contrary to the evidence and that the trial court committed error in its rulings in admitting testimony upon the part of appellee.

It appears from the evidence that appellant and appellee lived upon adjoining farms; that appellant's home farm was to the west of the farm occupied by appellee, who was a tenant of his father, and that appellant also owned another farm which lay to the north and east of appellee's land and across the road therefrom; that appellant on the thirtieth day of April, 1905, was returning to his home farm from his land or farm east and north of appellee's, and was crossing the lands of appellee when appellee fired upon appellant with a shot gun. The affray was witnessed by no one except the parties to the suit, although a Mr. Bonwell and his son, who were about thirty rods away, heard the report of the gun and saw the parties in the field. Neither Mr. Bonwell nor his son heard what was said by either Jennings or Legg at the time of the trouble and did not go to the place where the shooting occurred. The most that can be said of the testimony of Bonwell and his son is that it shows that the shooting took place and that it took place in appellee's field.

Appellant testified that he crossed the Legg land in going back and forth between his home farm and the farm north and east of appellee to take care of his stock on the latter place; that it was the nearest way for him to go; that on the day in question he was crossing appellee's field to his home when appellee, without warning, fired upon him. Appellee testified that appellant had frequently gone across the field in question and in passing had taken corn therefrom; that in January and February, before the shoot-

ing took place, he told appellant not to go through his field, when appellant replied, "that he would kill him, that his old father was crazy and he would put him under the sod;" that on the day in question he went to the field and there told appellant "to drop the corn he was picking up" and leave the field, when appellant again said he would kill him; that "he threw his hand around to his hip pocket and said, 'I will kill you,' and made at me and I raised my gun and fired."

One Milton Scott testified that Jennings said to him, "I will kill you and Don Legg," and that he, Scott, believed that he had said to Legg, before the trouble took place, "to look out, because Jennings said he would kill him."

While we might be disposed to think that a verdict in favor of appellant could have been well sustained upon the evidence, or even that the evidence seemed to preponderate in favor of appellant's theory of the affray, yet the verdict is not so manifestly against the weight of the evidence that we are warranted in reversing the judgment on that account.

Appellant argues that the court committed error in admitting testimony upon the part of appellee to the effect that appellant had frequently crossed the Legg land and had made threats against appellee prior to the time of the trouble; that Legg's father was crazy and he would put appellee under the sod; and in permitting Scott to testify that Jennings had said to him that he would kill both him and Legg.

We find upon an examination of the record that most, if not all, of these matters were given in evidence in some form without objection. It is true that in some instances objections were made by appellant to the giving of the testimony upon the subjects named, yet the record discloses that testimony was given without objection to show that appellant crossed Legg's field in going to and returning from what was called the "Love farm;" also, that he was forbidden to do so on different occasions and that Jennings said to Legg,

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prior to the time of the trouble, "Your old daddy is crazy, and I will put you under the sod." Appellant's objections and exceptions can be of no avail to him, made to questions of the above character, since he allowed other questions of the same import to be answered without objection. The record further shows that Scott's testimony to the effect that Jennings had said to him he would kill both him (Scott) and Donald Legg, was not allowed by the trial court to stand as evidence in the case until the witness further testified that he believed he had had a talk with Donald and had told him to look out because Jennings had said he would kill him.

The case seems to have been tried upon its merits, the evidence was very close and conflicting, that its determination depended solely upon the credibility of the witnesses and the weight to be given to their testimony. In such a case the verdict should not be disturbed unless some prejudicial error was committed. The record discloses no such error and the judgment is affirmed.

*Affirmed.*

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#### A. P. Hanes v. Benjamin Newport et al.

STATUTE OF FRAUDS—*when defense to bill for specific performance.* A bill specifically to enforce a verbal option for a three-years' extension of a lease will be defeated by the defense of the Statute of Frauds, notwithstanding possession in the complainant, where the bill does not aver election to exercise the option and does not show payment of rent under the option as exercised or the making of valuable improvements predicated thereon.

Bill for specific performance. Appeal from the City Court of Mattoon; the Hon. H. S. Clark, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

HUGHES & CHEEZEM, for appellant.

EDWARD C. and JAMES W. CRAIG, JR., for appellees.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

A. P. Hanes filed a bill for specific performance of a contract, against Benjamin Newport and J. W. Adrian, in the City Court of Mattoon, to which said Newport and Adrian filed a demurrer. Upon hearing had thereon, the court sustained the demurrer and dismissed the bill for want of equity. Hanes appealed.

The bill, in substance, states that appellees owned a livery stable property in Mattoon, Illinois, and on October 20, 1905, verbally leased the same to appellant for a period of one year from the first day of December, 1905, at a rental of \$85 per month, payable at the end of each month with the option given to appellant to retain the property for three additional years at the same rate with the further agreement upon the part of appellees that they would on or about December 1, 1905, make repairs upon said property for the convenience of appellant, as follows: lay a concrete floor upon a part of the premises, lay a tile about the well, barn and wash rack, plaster and paint the office, make a tight ceiling over the stalls, put the doors and feed troughs in proper repair and put in water connections; that appellees agreed to prepare a lease in writing embodying such provisions, to be signed by both parties to the contract; that appellant, relying upon such verbal agreement, moved his family from Peoria to Mattoon and on December 1, 1905, took possession of the premises and demanded his lease; that appellees failed to comply with such demand, but promised to soon make a lease, upon the faith of which appellant continued his possession; that appellant had remained in possession of the premises and paid all rents due up to the time of filing the bill; that notwithstanding all the foregoing, the appellees had failed and refused to keep or perform the terms of said agreement and had refused to make any lease to ap-

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pellant; that said premises had not been improved as agreed upon, and upon that account were not worth the rental agreed upon and that appellant had been greatly damaged by reason of the failure of appellees to comply with the terms of said agreement. The bill prayed for specific performance of the contract and that appellees be ordered to refund to appellant the sum of \$50 per month for nine months and that an account be taken of the damages sustained by appellant by reason of the failure of appellees to comply with the terms of the agreement and appellees ordered to pay the same.

To this bill appellees filed a demurrer, and, among other grounds, contended that the bill did not state such a case as entitled appellant to any relief in equity because the contract as alleged in the bill was contrary to the Statute of Frauds.

It is unnecessary to consider any of the other objections urged against said bill for the reason that we regard the Statute of Frauds as a complete defense.

The sole and only grounds alleged by appellant to take the case out of the operation of the Statute of Frauds are that he took possession of the premises involved and paid his rent at the agreed rate while he was so in possession and relied upon appellees' promise that they would execute a written lease according to the verbal agreement.

There was no allegation in the bill that appellant had exercised his option to continue the lease for the three additional years, although he seeks to make that election for the first time in his reply brief filed in this court. This falls short of the requirements necessary to remove the bar of the statute.

A verbal contract for the sale of an interest in real estate for a period exceeding one year can be taken out of the operation of the Statute of Frauds only by the payment of the purchase price, being let into possession and the making of valuable improvements. While the cases may not all go to the length of

requiring all of these acts to constitute a part performance of the contract, such as to authorize a decree for specific performance, there is no well-considered case which has dispensed with the payment of the purchase price. *Holmes v. Holmes*, 44 Ill. 168; *Wright v. Raftree*, 181 Ill. 473.

There is no allegation in the bill that appellant had made any payment except the rent agreed upon. That cannot be construed to be a payment upon the agreement for the three additional years, for the reason that in the bill appellant has not alleged any election to extend the lease beyond the one year, with notice thereof to appellees. Such payment, to have any force or value in that respect, would, of necessity, have to relate to the whole leasehold period, as claimed by appellant, including the added years, as distinguished from the rental for the time during which appellant had already occupied the premises as a tenant; that is, the payments would have to relate to the contract in the form in which appellant is now seeking to enforce it. *Shovers v. Warrick*, 152 Ill. 355.

The demurrer was properly sustained and the decree of the court below is affirmed.

*Affirmed.*

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### Charles Bogardus v. Phoenix Manufacturing Company.

1. **GUARANTOR—when estopped to urge deviation in original undertaking.** Where the guarantor has participated in a course of dealing contrary to the original undertaking, he thereby waives his right to insist upon a strict performance of the original undertaking.

2. **GUARANTOR—what not substantial departure in original undertaking.** A guarantor is not released by deviation in the original undertaking which consists in a change of the place of payment from one state to another where no prejudice could result.

3. **DECLARATION—what rejected as surplusage.** Where a declaration states a cause of action, an immaterial averment will be rejected as surplusage.

**Assumpsit.** Appeal from the Circuit Court of Ford county; the

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Bogardus v. Phoenix Mfg. Co.

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Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

M. H. CLOUD and KERR & LINDLEY, for appellant.

C. E. BEACH and F. M. THOMPSON, for appellee; BUNDY & WILCOX, of counsel.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

The Phoenix Manufacturing Company instituted suit against Charles Bogardus in the Circuit Court of Ford county, to recover upon a guaranty in writing, executed by said Bogardus, by the terms of which it is claimed he obligated himself to pay notes made by one Neils C. Neilson to said Phoenix Manufacturing Co., upon default therein by Neilson. Demurrer was interposed by Bogardus to an amended declaration, which was overruled. Bogardus elected to abide by his demurrer, whereupon the trial court rendered judgment against him in the sum of \$2,245.05, from which he has prosecuted an appeal.

The written guaranty upon which appellant's liability is asserted is set forth in full in *Bogardus v. Phoenix Manufacturing Co.*, 120 Ill. App. 46, and, therefore, need not be here repeated. The declaration then under consideration was held to be defective, the judgment reversed and the cause remanded. The question now presented is whether or not the amended declaration, herein involved, states such a cause of action that the judgment upon it should be sustained.

In such amended declaration it is alleged, in substance, that appellee, on the tenth day of October, 1901, proposed in writing, through its salesman, A. E. White, to furnish to one Neils C. Neilson, of Pellston, Michigan, certain saw mill machinery, a part to be delivered f. o. b. at Indianapolis, Indiana, a part f. o. b. Eau Claire, Wisconsin, and the remainder, f. o. b. Chicago, Illinois, all to be shipped on or before November 1, 1901, to said Charles Bogardus, appellant, Pells-

ton, Michigan, for the sum of \$2,620, payable in New York, Chicago or Milwaukee exchange, free of expense to appellee, one-third to be due in twelve months, one-third in eighteen months and the balance in twenty-four months from date of shipment, to be witnessed by the notes of said Neilson in equal amounts bearing six per cent. interest; that this proposition was accepted by said Neilson on the eleventh day of October, 1901; that in consideration that appellee would approve said proposition and furnish such machinery as proposed by said salesman and would accept the notes of Neilson therefor, the said appellant executed and delivered to appellee the written guarantee hereinbefore referred to, agreeing that if said Neilson should fail to make the payments provided for in said notes, he, appellant, would be responsible therefor to appellee; that in consideration of such guaranty so made by appellant, appellee on the 12th day of October, 1901, approved of the sale and entered into the performance of the contract; that on or before November 1, 1901, appellee furnished f. o. b. cars at Indianapolis and Chicago, part of the mill machinery so specified, and shipped the same to appellant at Pellston, Michigan; that on the 13th day of November, 1901, appellee furnished and delivered f. o. b. cars at Eau Claire, Wisconsin, the remainder of such mill machinery, shipped and consigned to said appellant at Pellston; that the carrier at Eau Claire refused to convey such machinery unless the freight thereon was prepaid, and appellee thereupon prepaid said freight charges to Pellston; that appellant, with knowledge that said articles to be so shipped from Eau Claire had not been shipped on or before November 1, 1901, on the ninth day of November, 1901, instructed and directed, in writing, shipment thereof to be made; that upon the arrival of the articles so shipped from Eau Claire, at Pellston, the appellant accepted said articles from the carrier and paid the freight thereon that had been so prepaid by appellee.

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The amended declaration further charged that all the articles so furnished were constructed of good material and were made in workmanlike manner as required, and were shipped in good order; that on the thirteenth day of November, 1901, said Neilson executed and delivered to appellee his three promissory notes, each for \$873.33, payable to appellee at the First State Bank of Petoskey, Michigan, at six per cent. interest, due, respectively, in twelve, eighteen and twenty-four months after their date, which said notes were submitted by said salesman, A. E. White, to appellant, who directed the signing and delivery thereof by Neilson to appellee; that Neilson defaulted in the payment of said notes, wherefore it was claimed that appellant was liable upon his guaranty to appellee, etc.

The declaration under consideration when the former cause was before this court, reported in 120 Ill. App., *supra*, was held to be insufficient upon the ground that the contract provided that the machinery should be shipped on or before November 1, 1901, and that the notes to be given by Neilson should be payable in twelve, eighteen and twenty-four months from date of shipment; that the note upon which appellant's liability as guarantor was alleged, was dated November 13, 1901, thirteen days later than the one in which he had agreed to be responsible and that there was no allegation of fact in the declaration connecting the guaranty of appellant with the note sued upon. The question now made is whether or not by the amended declaration that objection has been overcome and appellant so far connected with the completion of the transaction that he is liable upon his written guaranty.

The amended declaration, in our judgment, states a good cause of action against appellant. In it, it is averred that on the ninth day of November, 1901, nine days after the machinery was to be shipped under the terms of the contract, appellant directed in writing that such shipment from Eau Claire should be made;

that upon the arrival of such machinery at Pellston, appellant accepted the same from the common carrier and paid to appellee the freight which it had prepaid on the shipment from Eau Claire. Notwithstanding these averments, appellant contends that the variance of thirteen days in point of date and maturity is sufficient to discharge him and bases that contention on the ground that the liability of a guarantor cannot be extended by implication. This doctrine, however, can have no application here, since appellant's conduct in connection with the acts which constitute the variance were such as to estop him from taking advantage of such variance. If appellant had done nothing, himself, after November 1, 1901, either to further or complete the transaction, his position would be tenable, but as he directed, in writing, the shipment of a part of the machinery several days after the time first fixed for its delivery, accepted the machinery upon its arrival at Pellston, and repaid to appellee the freight prepaid upon a part thereof, he must be held estopped from denying the regularity of the delivery and to have waived his right to insist upon the specific time of performance. *Eyster v. Parrott*, 83 Ill. 517; *Moline Malleable Iron Co. v. McDonald*, 38 Ill. App. 589; *Brown v. Abbott*, 110 Ill. 162.

Appellant next contends that he, as a guarantor, is released because the notes given by Neilson to appellee were made payable at the First State Bank of Petoskey, Michigan, instead of payable in New York, Chicago or Milwaukee exchange, as provided for in the original proposition. The variance, however, is not of a substantial nature and is not of such a character as to defeat a guaranty under the circumstances alleged. By the terms of appellant's guaranty he was to become responsible for the notes as they matured if Neilson failed to make payment. The evident purpose of appellant in that clause of the guaranty was that he, appellant, in case of default by Neilson, could have the notes assigned to himself and

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bring suit in his own name. This purpose could have been accomplished as well upon the notes as drawn, as upon notes payable in New York or Chicago exchange.

Appellant next argues that the amended declaration is faulty in that it contains a verbal promise upon the part of appellant to extend the original guaranty counted upon. That much of the declaration as relates to the submission of the notes by White to appellant, and the directing of Neilson by appellant to execute them, should be treated as surplusage. Knoebel v. Kircher, 33 Ill. 308. The declaration states a complete cause of action without such averment and the demurrer thereto was properly overruled.

The judgment was right and is affirmed.

*Affirmed.*

Appellant's motion to tax the cost of the blue print to appellee is allowed.

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#### Charles Bogardus v. Phoenix Manufacturing Company.

This case is controlled by the decision in *Bogardus v. Phoenix Mfg. Co.*, *ante*, p. 456.

**Assumpsit.** Appeal from the Circuit Court of Ford county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

M. H. CLOUD and KERR & LINDLEY, for appellant.

P. E. BEACH and F. M. THOMPSON, for appellee; BUNDY & WILCOX, of counsel.

**PER CURIAM.** The questions here involved are identical with those discussed in *Bogardus v. Phoenix Manufacturing Company*, *ante*, p. 456, and the holdings therein announced are decisive of this case. The

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judgment in favor of appellee in the sum of \$1,122.50 is affirmed.

*Affirmed.*

Appellant's motion to tax cost of blue print to appellee is allowed.

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**Toledo, St. Louis & Western Railroad Company v. S. F. Wilson.**

1. **SECONDARY EVIDENCE**—when erroneous admission of, not prejudicial. Notwithstanding secondary evidence may have been erroneously admitted, a reversal will not follow where the fact which such evidence tended to prove was amply established by other competent evidence.

2. **VALUE**—what not competent upon cross-examination with respect to. Where the question at issue was the value of cattle claimed to have been killed it is not proper upon cross-examination to inquire as to whether or not like cattle had not been sold for a less price at public sales occurring in the same neighborhood.

Action on the case. Appeal from the Circuit Court of Coles county; the Hon. J. W. CRAIG, Judge, presiding. Heard in this court at the November term, 1906. *Affirmed.* Opinion filed June 1, 1907.

**C. A. SCHMETTAU, EUGENE RHEINFRANK and A. J. FRYER, for appellant.**

**EDWARD C. and JAMES W. CRAIG, JR., for appellee.**

**MR. PRESIDING JUSTICE RAMSAY** delivered the opinion of the court.

S. F. Wilson brought suit in the Circuit Court of Coles county against the Toledo, St. Louis & Western Railroad Company to recover damages alleged to have resulted from the killing and injuring, by the railroad company, of the cattle of Wilson. There was a verdict and judgment in favor of Wilson in the sum of \$650. The railroad company appealed.

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Toledo, St. L. & W. R. R. Co. v. Wilson.

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It appears from the evidence that appellee, who was the owner of a herd of Hereford cattle, put the same in the pasture of one John Biggerman, which was adjoining appellant's railroad; that said cattle escaped from said pasture and got upon the track of appellant, where, on the night of December 21, 1905, seven of the cows and one calf were killed and another cow crippled.

There was some controversy in the case as to just the point at which the cattle got upon the right of way of appellant and as to the condition and repair of appellant's fence at the place or places where they got upon such right of way; but these questions were questions of fact alone, and were fairly left to the jury to determine. From a consideration of the record, we are satisfied that the verdict of the jury was fully warranted and in accord with the weight of the evidence.

Appellant contends that the trial court committed error in allowing appellee to introduce in evidence certificates made by one C. R. Thomas, secretary of the American Hereford Cattle Breeding Association, to the effect that the cattle involved were "registered" cattle, and argues that said certificates were secondary evidence and hearsay merely, in character.

Even if appellant's claim upon this score is correct, the error was not prejudicial to its cause, for the reason that there was ample undisputed evidence in the case besides the certificates, given without objection, that all of the cattle killed and injured were registered cattle. R. F. Nichols testified that he knew the cattle, that they were thoroughbred Herefords and were registered, to the giving of which testimony no objection was made. Testimony of like character was also given upon the same subject by appellee, without objection. The ruling of the court upon this question could, therefore, have done appellant no harm.

Appellant alleges error in the action of the trial court in not permitting it, upon cross-examination of appellee's witnesses, who testified to the value of the

cows killed, to ask whether or not at a public sale or sales of Hereford cattle in that neighborhood cows had not been sold for a price less than that fixed by the witnesses for the cattle killed. In this there was no error. Such a line of cross-examination would have presented an issue that was collateral only to the question to be tried, as all of the elements of the sale referred to, such as the weather, the size of the crowd, whether favorably located and fully advertised, as well as the condition of the cattle sold compared with those involved in this suit, would have needed to be taken into account. Such a cross-examination would have tended to confuse rather than enlighten the jury.

That the injuries complained of were caused by appellant and that its fence was defective along the line of its railroad where the cattle got upon its right of way were matters concerning which there was but little doubt under the evidence. Appellee proved by abundant testimony that his damages amounted reasonably to \$610; that his cows killed were with calf by a bull that was worth about \$2,800; and that the reasonable value of the attorney's fee for prosecuting the claim involved was from \$35 to \$40.

The jury allowed appellee \$650, which was in accord with the merits of the case. We find no prejudicial error in the record and the judgment is affirmed.

*Affirmed.*

Appellee's motion to tax the costs of the additional abstract to appellant, is allowed.

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#### Peoria Life Association v. Bernard Goodwin.

INSURANCE—when *false statements in application vitiate*. An action upon an insurance policy may be defeated by showing that the insured in his application falsely represented that he was not and had not been afflicted with a venereal disease.

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Peoria Life Association v. Goodwin.

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**Assumpsit.** Appeal from the Circuit Court of Vermilion county; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

WOLFENBARGER & MAY and DWYER & DWYER, for appellant.

SALMANS & DRAPER, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Bernard Goodwin brought suit in the Circuit Court of Vermilion county against the Peoria Life Association upon a policy of insurance providing for payment in case of permanent disability and recovered a verdict in the sum of \$500. Judgment was rendered thereon and the insurance company appealed.

Appellant filed several special pleas, among them one which averred that the appellee in his application for insurance had made a false statement as to his health, in that he had falsely represented to the company that he had never had syphilis, when, in fact, he had had such a disease prior to that time, and that by means of such false and fraudulent statement the policy was rendered null and void. Issue was joined upon such plea and the cause submitted to a jury upon the evidence, who found the issues in favor of the appellee.

Appellant has assigned a number of errors, but in the view we take of the case, it is only necessary to discuss one of them.

Appellant contends that the verdict is against the manifest weight of the evidence and for that reason the judgment should be reversed. We have made a careful examination of the evidence and are fully satisfied that this error is well assigned.

The application upon which appellant issued its policy of insurance was made on the ninth day of November, 1903, and the policy of insurance was is-

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sued seven days thereafter. In the application which appellee signed in order to secure a policy was this question: "Have you now, or ever had syphilis?" to which appellee answered: "No."

The evidence seems to greatly preponderate in favor of the untruthfulness of this answer and that appellee knew it to be untrue when he made it, as averred in said plea. Edward C. Grover, a neighbor of appellee, testified that he often visited appellee in the spring and summer of 1903; that he had a conversation with him in June or July of that year when appellee said, "He was knocked out, that he had a dose and that it had been the cause of trouble between himself and wife and that it had caused their separation and was the primary cause of her getting a divorce from him." This conversation, appellee did not deny. Anna McMillan testified that she knew appellee was sick; that he had a breaking out on his body and that to the best of her recollection it was in the spring of 1903. L. E. Sears testified that he had a conversation with appellee on March 29, 1905, in which he said he took the syphilis about four years prior to that time. W. G. Renneberg testified to the same thing, in substance, that Sears did. A. L. Fox testified that in a conversation he had with appellee in November, 1904, appellee said that he contracted the disease three years prior to that time.

While appellee denied some of these conversations and testified upon his examination in chief that he did not know on the ninth day of November, 1903, that he then had or ever had the disease in question, the evidence as a whole seems to point overwhelmingly to the conclusion that appellee was a victim of the disease for a considerable time prior to November 9, 1903, and that he knew of the fact as early as the spring or summer of 1903, if not earlier. Appellee's testimony upon this subject was quite unsatisfactory and his claim upon the appellant seems to have been based upon the theory which he stated to the witness

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Sears, to the effect that it made no difference whether or not he had the disease, since the doctor, who examined him when he made his application, had passed upon the same favorably and had recommended him as a fit subject for insurance.

The verdict is against the manifest weight of the evidence. The judgment is reversed and the cause remanded.

*Reversed and remanded.*

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**W. G. Howell v. Merchants Trust and Security Company.**

**INDORSEES—when protected against defenses.** An indorsee or assignee of commercial paper who takes the same before maturity, for a valuable consideration, without knowledge of any defect, and in good faith, will be protected against the defenses of the maker, and mere suspicion of defect of title, or the knowledge of circumstances calculated to excite suspicion in the mind of a prudent man, or even gross negligence on his part, at the time of the transfer, will not defeat his title. In other words, the only thing which will defeat his title is bad faith on his part, and the burden of proof is upon the party assailing his right to establish that fact by a preponderance of the evidence.

**Assumpsit.** Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**LE FORGE & VAIL and JACK & DECK,** for appellant.

**HUGH CREA and HUGH W. HOUSUM,** for appellee.

**MR. PRESIDING JUSTICE RAMSAY** delivered the opinion of the court.

The Merchants Trust & Security Company brought suit in the Circuit Court of Macon county against W. G. Howell, upon four promissory notes. After suit had been commenced, by agreement of the parties, another

suit that had theretofore been commenced upon another note for a like amount, similar in character, and signed by said Howell, was consolidated with the suit upon the four notes and a trial had upon the five notes. There was a verdict and judgment in favor of the Merchants Trust & Security Company in the sum of \$280.25, from which Howell has appealed.

At the conclusion of the trial appellee entered a motion that the court instruct the jury to return a verdict in favor of the plaintiff (appellee), which motion the court sustained and directed the jury to find a verdict for plaintiff for the amount of the five notes with interest. The question, therefore, to determine is whether or not the trial court committed error in not allowing the case to go to the jury.

It appears from the evidence that on February 21, 1905, appellant purchased from the Neel, Armstrong Company a medical apparatus for which he was to pay the sum of \$650, one-half of which amount he paid in cash, the other half of which was to be paid in monthly installments witnessed by six promissory notes, for a trifle over \$54 each, all of which notes, except the one first due, were the bases of recovery in this suit.

The undisputed testimony of William F. Pelham, manager of appellee, showed that appellee's business was that of buying and selling commercial paper; that on the twenty-eighth of February, 1905, only seven days after the making of said notes, and before the maturity of any of them, appellee purchased said six notes from the Neel, Armstrong Company and paid for the same by check, duly honored, the sum of \$208; that each of said notes was duly indorsed and delivered by the Neel, Armstrong Company, to appellee; that appellee, at the time of the purchase of said notes had no notice of any failure of consideration and had no knowledge of any objection or complaint upon the part of appellant concerning the transaction.

Appellant, to defeat recovery, gave testimony tending to show that the apparatus bought by him from

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the Neel, Armstrong Company was to be carefully and skillfully constructed and warranted to do its work properly; that it worked badly and on that account the consideration for the notes had failed; that upon the maturity of the note first due, of the series of six notes (not being one of the five notes sued upon, however), and after appellee had bought the six notes and they had been assigned, appellant wrote to the Neel, Armstrong Company, requesting an extension of the time of payment upon said note first due and an arrangement was made whereby a new note was taken in place of said note number one, to fall due after the five notes sued on, and note number one was canceled and surrendered; and when the machine was sold by the Neel, Armstrong Company to appellant, that appellant accompanied Dr. Ross, agent for the Neel, Armstrong Company in making the sale, to the Citizens National Bank of Decatur, where Dr. Ross was offered, by the cashier of said bank, the sum of \$325 in cash for said notes, if appellant would say that the medical apparatus was all right, and that said Dr. Ross refused to accept such proposition.

Appellant also read in evidence some letters from the Neel, Armstrong Company, or those acting for it, to appellant, none of which in any way made reference to appellee, except one dated March 21, 1905, which read as follows:

“NEEL, ARMSTRONG CO., 300 CAXTON BLDG., 334 DEARBORN ST.,  
CHICAGO, ILL., MARCH 21, 1905.

W. G. HOWELL, M. D.,  
Decatur, Ills.

DEAR DOCTOR:—Your note which was due to-day was sent to the Decatur Bank for collection by the Merchants Trust and Security Company who carried our deferred paper before we received your request for thirty days' extension. Now we would suggest that you execute a new note payable thirty days after the last one of the series,—you have is due and we will

then cancel and return your first note which is now in the bank of Decatur with instructions given to-day to hold for thirty days. This will avoid complications.

Yours very truly,

Wm. D. NEEL."

This, in substance, was all the evidence given or offered by appellant to defeat a recovery upon the notes sued on.

The rule is well established in our state that "the indorsee or assignee of commercial paper who takes the same before maturity, for a valuable consideration, without knowledge of any defect and in good faith, will be protected against the defenses of the maker, and mere suspicion of defect of title or the knowledge of circumstances calculated to excite suspicion in the mind of a prudent man, or even gross negligence on his part at the time of the transfer, will not defeat his title. In other words, the only thing which will defeat his title is bad faith on his part and the burden of proof is upon the person assailing his right to establish that fact by a preponderance of the evidence." Bradwell v. Pryor, 221 Ill. 602-605; Matson v. Alley, 141 Ill. 284; Fidler v. Paxton, 101 Ill. App. 107.

In the case at bar not only was there no evidence showing bad faith upon the part of appellee in the purchase of the notes in question, but there was no testimony given or offered that tended to prove that claim. The most that can be said of the evidence given and offered by appellant is that it showed some matters of suspicion as against the Neel, Armstrong Company. There is no evidence to support the claim made, that appellee did not buy the notes in dispute in the regular course of business and before maturity; nor is there any suggestion even that appellee knew of what passed between appellant and Doctor Ross at the bank in Decatur. The fact that the Neel, Armstrong Company, at appellant's request, was able to extend the time of payment upon his note first due, did

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not of itself tend to show bad faith upon the part of appellee; while the letter of the Neel, Armstrong Company of March 21, 1905, states that appellee carried their deferred paper and that said note so first due had been sent to the bank at Decatur for collection by appellee, and not by the payee.

Objections were made by appellant to the ruling of the trial court upon the matter of receiving testimony upon the part of appellee and refusing to admit evidence offered by appellant, but we hold that all of appellant's evidence as given and offered did not tend to make a defense, in the absence of an offer to prove that the notes were bought after maturity, or that appellee, at the time of the purchase, had notice, in some way, of appellant's defense thereto. It is, therefore, unnecessary to discuss such objections. The action of the court in taking the case from the jury was not unwarranted.

The judgment is affirmed.

*Affirmed.*

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#### Finch Bros. v. Arthur Betz.

1. COMMISSIONS—*when broker entitled to.* A broker is entitled to commissions upon a sale concluded by his principals if he is the procuring cause in the consummation thereof.

2. WITNESS—*right to refresh recollection.* If a witness called by a party unexpectedly gives testimony which is at variance with a previous written statement made to such party, such written statement may be brought to the attention of the witness for the purpose of refreshing his memory or awakening his conscience.

Assumpsit. Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

J. R. FITZGERALD, for appellants.

REDMON & HOGAN, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

Appellee recovered a judgment against appellants for the sum of \$200, claimed by him to be due from them as commissions upon the sale of certain horses.

The following facts are undisputed: Prior to February 19, 1904, appellee, a farmer, residing near Argenta, Illinois, visited the stock farm of appellants, who were importers and breeders of draft horses at Verona, Illinois, with a view to purchasing a stallion. He failed to find one that suited him, and on February 19th, while returning home, he met one J. E. Nye on the railroad train. In the course of a conversation with Nye he learned from him that he desired to purchase a first-class stallion. Appellee thereupon described "Born Royalty" and "Nottingham Herald," two of the stallions he had seen at appellants' stock farm, and gave Nye the price asked for the former horse. He also requested Nye to go to appellants' stock farm and inspect the horses. Shortly thereafter, and before he had reached his home, appellee wrote and mailed to appellants, from Champaign, Illinois, the following letter:

"CHAMPAIGN, ILL., Feb. 19, 1904.

FINCH BROS., Verona, Ill.

DEAR SIRS:—I met a man on the train that I think would buy Born Royalty. I am not home as yet; am in Champaign. I will go on home tonight. \* \* \* Now, in regard to this deal: Would there be \$100.00 commission if I sent this man up and you made a sale to him? I think he would do business if he did not go too low on his feet. Let me hear from you. Address me at Argenta, Ill. Respectfully yours,

ARTHUR BETZ."

On the following day Nye wrote to the appellants the following letter which was received by them on February 23rd:

"THOMASBORO, ILL., Feb. 20, 1904.

FINCH BROTHERS, Verona, Ill.

GENTLEMEN:—I met a gentleman yesterday on the

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train and he was telling me you had some Shire stallions for sale. Will you please send your catalogue, or if you haven't them catalogued send me a description and lowest prices, 1/3 cash, balance in 1 and 2 years, will buy a good Shire stallion if the price is right. Awaiting your reply, I am respectfully yours,

J. E. NYE."

On February 22nd, appellants replied to appellee's letter as follows:

"VERONA, ILL., Feb. 22, 1904.

MR. ARTHUR BETZ, Argenta, Ill.

DEAR FRIEND:—Yours received, and in reply will say that we will give you \$100.00 commission on any horse you may sell for us. Did you price Born Royalty to him; if so at what price? We would not like to sell him for less than \$1600.00 and give \$100.00. However, we would take \$1400.00 cash. Let us hear from you.

Yours truly,  
FINCH BROS."

To which letter appellee replied as follows:

"ARGENTA, ILL., Feb. 24, 1904.

FINCH BROS., Verona, Ill.

DEAR FRIENDS:—In answer to yours of the 22nd will say that I told this party that he could buy Born Royalty for \$1500.00 spot cash. I told him you would probably ask him \$1800.00 for him but that if he had \$1500.00 cash I thought he could buy him. This man's name is J. E. Nye and he is in the real estate business at Thomasboro, Ill., about 10 miles north of Champaign. I understand that he owns property in Champaign. Now this party has promised me that he would go and see your horses, if he does not come soon you had better look him up. I think it would be better for you to see him as I left the impression that I was not interested in the sale, and if I went to see him at once he might suspicion that I was a capper or an agent, etc., and not go. I think that if he comes up you can do business with him. I have an uncle who is acquainted with him and together I think we can do business. Very respectfully,

ARTHUR BETZ."

After the receipt of Nye's letter, one of appellants first communicated with him by telephone and then visited him at his home and induced him to go to Verona and look at the horses. He subsequently, on March 7, 1904, bought the stallions "Born Royalty" and "Nottingham Herald," for the sum of \$1,900. By the terms of sale appellants warranted them to be average breeders and agreed that in case either proved not to be such, to replace him with another stallion of equal value.

"Born Royalty" failed to fill the warranty, and was returned to appellants, who replaced him with another stallion. Upon learning of the sale of the horses, appellee wrote to appellants, demanding the sum of \$200, which he claimed was due him as commissions. Appellants refused to pay the same, claiming that they had effected the sale themselves. Some time thereafter appellee prepared and procured Nye to sign a letter addressed to appellee, purporting to set forth the facts relating to the transaction as Nye knew and understood them, and to which it was stated, he was willing to testify. The facts as given in the letter differed in several particulars from the testimony given by Nye upon the trial. The letter also contained the statement that, "I consider that you were the cause of me purchasing these two horses as it was from you I first obtained the information in regard to them." The court, over the objections of appellants, admitted the foregoing letter in evidence, as Exhibit "5."

Appellee testified on the trial that when he visited appellants' farm, appellant, Jesse Finch, told him that if he would send anybody up there who would buy "Born Royalty," or anything else they had there, he would pay him a commission, and that in his conversation with Nye, he told him, Nye, that the price of "Born Royalty" was \$1,500, but that he could be bought for \$1,400, and further that Nye told him he would go down and see the horses. Nye, when called

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by appellee, testified that the price appellee gave him on Born Royalty was \$1,700 or \$1,800, but that he said the horse could be bought for \$1,500. He further testified that he did not think he told appellee that he would go to see the horses, and that he did not mention appellee's name to appellants in connection with the transaction. Appellant, Jesse Finch, testified that he never had a conversation with appellee in which he agreed to or did employ him or agreed to pay him for selling any of their property, or that he ever knew that Nye was the person to whom appellee referred in his letter.

It is first contended by appellants that inasmuch as appellee, as they claim, had no authority to sell the horse at the time he had the conversation with Nye, and did nothing thereafter to further a sale, such conversation could not properly be regarded as the procuring or inducing cause of the sale afterward consummated, in other words, that one who merely puts another upon inquiry as to property in the market, prior to his employment to sell, and does nothing thereafter, is not entitled to compensation, although a sale is effected through efforts made by him prior to his employment as agent. Were it not for the fact that there is evidence tending to show an agreement by appellants, made at the time appellee was at Verona, that in case he sent any one there who bought horses, they would pay him for doing so, there would be force in such position. While the evidence as to whether or not such agreement was entered into was conflicting, the question was one for the jury, who were the sole judges of the credibility of the respective witnesses, and of the weight to be given to their testimony, and we are not at liberty to disturb their finding upon the question. If, as claimed, by appellee, appellants agreed to pay him commissions in case he sent them buyers for any of their horses, and through the instrumentality of appellee, Nye was brought to the notice of appellants as a possible pur-

chaser and a sale to him was thereafter accomplished, such efforts on the part of appellee were the efficient and procuring cause of such sale, and appellee, by reason thereof, became entitled, under his agreement with appellants, to commissions for his services. The fact that appellants negotiated the sale themselves, without the further aid of appellee, or that they may not have known at the time that Nye was the person referred to in appellee's letter, is unimportant so long as such facts existed and they were not misled by appellee. *Adams v. Decker*, 34 App. 20; *Hafner v. Herron*, 165 Ill. 250. Moreover, the jury were not unwarranted in believing that appellants knew when they received the letter from appellee that Nye was the person referred to by him in his letter. The two letters were written at practically the same time, and both refer to a meeting and conversation upon a railroad train, in relation to the same class of horses which appellants had for sale.

The fourth instruction given at the request of appellee told the jury, in substance, that the fact that the horses were sold upon the condition that if they or either of them failed to prove good breeders they could be returned and replaced with others of equal value, and that in accordance with such agreement one of said horses was returned to appellants and by them replaced with another, would not deprive appellee of his right to recover commissions. The contention of appellants that the court erred in giving such instruction is without merit. The fact that appellants warranted the horses to be fit for the purpose for which they were offered for sale and purchased by Nye did not render the sale conditional as claimed. The sale was, nevertheless, an absolute one. The instruction in question correctly stated the law, and appellants' fifth instruction to the contrary was properly refused.

It is further insisted that the conduct of appellee in stating to Nye that while the price of Born Royalty

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was \$1,500, he might be bought for \$1,400, was such a breach of faith toward appellants as to deprive him of the right to compensation. Such contention is equally untenable. The agreement between the parties as testified to by appellee, was not that he was to send customers for horses at certain fixed prices, but was merely to interest persons who would purchase, presumably upon terms satisfactory to appellants. This he did and any statements he may have made as to what the horses could be purchased for were, under the circumstances, unimportant.

We think, however, the complaint that the court erred in the admission in evidence of Exhibit 5 is well founded. If the witness, Nye, unexpectedly to appellee, gave testimony which was at variance with the statement in question, appellee had a right to call his attention to such statement for the purpose of refreshing his memory or awakening his conscience. It was not proper to introduce the same evidence either for the purpose of having the jury consider it as independent evidence or for the purpose of impeaching the witness. Chicago City Ry. Co. v. Gregory, 221 Ill. 591. We would not, however, be inclined to hold that the admission of the exhibit was so prejudicial to appellants as to warrant a reversal in so far as it purports to state facts; the variance between such statements and the testimony given by Nye upon the witness stand not being material in the light of the foregoing views.

But this is not so as to the belief therein expressed by Nye that appellee was the cause of his having purchased the horses. The evidence upon the crucial question as to whether appellants had prior to the receipt of appellee's letter, promised to pay him commissions in the event that he sent purchasers, was close and conflicting, and we are not satisfied that under such circumstances the portion of the letter referred to did not influence the jury, notwithstanding the trial court instructed them to disregard the same.

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For the error indicated the judgment will be reversed and the cause remanded.

*Reversed and remanded.*

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**Union Drainage District No. 1 of the Towns of South Homer and Sidell v. Drainage District No. 1 of the Towns of Vance and Sidell.**

DRAINAGE ACT—*by whom damages for benefits should be determined.* In an action under the Drainage Act by one drainage district against another for the recovery of benefits, the benefits should be assessed by the court and not by the jury impaneled for that purpose.

Proceeding under Drainage Act for recovery of benefits. Error to the County Court of Vermilion county; the Hon. CHARLES S. WHITE, Judge, presiding. Heard in this court at the May term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

RAY, DOBBINS & RILEY and J. B. MANN, for appellant.

REARICK & MEEKS, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

In an action under the Drainage statute for the recovery of benefits thereafter to be received by the defendant district by reason of the proposed deepening and enlarging of the drainage ditch of the plaintiff district, judgment was rendered in favor of the plaintiff for \$1,000, to reverse which this appeal is prayed by the defendant. The act upon which the suit is predicated provides that when a lower district enlarges or improves its ditches or canals or extends its outlet so as to benefit the lands of an upper district, such upper district so benefited shall be liable to the lower

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district "for the just proportion of the cost of the work \* \* \* as such upper district will be benefited by the work of such lower district." Section 2 of the act provides that if the commissioners of the respective districts cannot agree upon the amount the upper district shall pay, the commissioners of the lower district may bring suit in the County Court where such lower district was organized. Section 4 provides that the "court" shall determine from the evidence what sum, if any, the lower district shall receive from the upper district. Section 5 provides that it shall not be necessary for the plaintiff to prove that it has completed the work of enlarging its ditches in order to recover. Section 6 provides that the commissioners of the upper district shall levy the amount of the judgment upon the lands of their district to pay such sum. Rev. Stat. 1905, page 837. When the cause came on for hearing, a jury was impaneled, over the objection of the defendant, to which the issues were submitted. A verdict was returned in favor of the plaintiff for the sum of \$1,000, upon which the present judgment was rendered. We are of opinion that the trial court erred in submitting the issues to a jury. The third section of the act in question, provides that the cause shall be heard at any probate or common law term and that the practice shall be as in cases at common law, and, as we have seen, the fourth section provides that "upon the hearing of the cause the court shall determine from the evidence what sum, if any, the lower district shall receive," etc. The latter section clearly contemplates that the amount to be assessed, if any, shall be determined by the judge who presides over the court, and not by a jury. The provision of the third section, *supra*, to the effect that "the practice shall be as in cases at common law," obviously relates to the manner in which the issues shall be formed and determined, and not as to by whom. For the error indicated, the judgment must be reversed and the cause remanded,

and it will be unnecessary now to determine the other questions presented and argued by counsel.

*Reversed and remanded.*

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**William R. White et al. v. Thomas Moran.**

1. **DECETT—*who may be held for.*** Those who have actual or constructive knowledge of the fraudulent character of an enterprise and with such knowledge aid and abet its furtherance, and by means of false and untrue representations induce a person to invest therein, are jointly and equally liable with the principal in the enterprise likewise charged with fraud and deceit in inducing the investment in question.

2. **ARGUMENTS OF COUNSEL—*propriety in limits of.*** While counsel have the right fully and freely to discuss the evidence in a case, and to draw and express all reasonable and legitimate inferences therefrom, great care should be exercised to refrain from indulging in excessive invective and epithets, and to keep within the record.

Action in case for fraud and deceit. Appeal from the Circuit Court of Logan county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1905. Reversed and remanded. Opinion filed December 21, 1906.

**BLINN & COVEY, HUMPHREY & ANDERSON and WELTY,  
STERLING & WHITMORE,** for appellants.

**BEACH, HODNETT & TRAPP, KING & MILLER and BALDW  
IN & STRINGER,** for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case, by appellee against appellants, for alleged fraud and deceit. The plaintiff recovered judgment for \$1,659.25, to reverse which this appeal is prosecuted by the defendants. At the close of the plaintiff's case, and again at the close of all the evidence, the defendants severally moved the court

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to direct verdicts in their favor; which motions were overruled.

The first count of the declaration charges in substance that on November 21, 1903, and prior thereto, the defendant, White, claimed to be the patentee and owner of certain patents covering swinging farm gates; that the defendants, with the intent to defraud the plaintiff, represented to him by means of certain printed circulars and copies of pretended letters and excerpts from newspapers and by oral statements, that the gates manufactured under said patents were very valuable; that there was a large demand for them and they were selling rapidly; that divers persons had made large sums of money in a very short time in selling the same; that various customers of the said White had purchased territory and territorial rights to said patents under the contract thereinafter set forth, and had in a very short space of time made vast sums of money in selling the same; that plaintiff could do likewise by purchasing the territory described as the county of Ashland in the state of Ohio; that the plan of operation prescribed by said contract was the best and most wonderful money-making scheme ever known; that all the notes taken in the sale of territory remained in the hands of said White until maturity and were not assigned or placed in the bank. It is then further averred that all of the foregoing representations of said defendants were false and untrue and known by them and each of them to be so; that they were made for the purpose of inducing the plaintiff to rely thereon and to defraud him, and that the plaintiff, relying upon and confiding in said false representations, was deceived thereby and induced to enter into a contract with the defendant White for the purchase of the patent right to the county of Ashland in the state of Ohio, and of a so-called United States agency for the sale of territory. The material portions of the contract, which is set out in full in said count, are as follows:

**"THE VALUABLE UNITED STATES AGENCY.**

I hereby agree to give to Thomas Moran, of Lincoln, one-half of all townships, counties, and gate rights of unsold territory that he may sell on my new gates and designs, as now handled by me, he paying his expenses, sending in my part as soon as practicable, but keeping all he gets in the territory purchased of me.

Arrangements have been made for those who take one county at \$500, and an agency of \$1,000, or two counties and an agency for \$2,000, to permit such purchaser to sell townships in many counties where they have been sold in lots of two or more, keeping one half, sending money to patentee who will forward it to the owner. Prices ranging from \$125 to \$175 per township.

2. If men are sent who cannot arrange to pay \$500, \$1,500 or \$3,000 and upward, the sender will be charged with car fare. \* \* \* It will be expected of each customer to pay one-third to one-half cash, and surely if notes are given they must be good and safe notes beyond question.

3. If a county has to be bought which has been sold to fit up a new customer, the party sending such customer will remember that the price for the county must be subtracted from the amount given by the new customer; then we divide equal on what is paid above the cost of said county. You can get your own notes or money back on the first trade or two if the pay from your first customer is as good or better than your own. After that you get the same kind of pay I get.

4. I further agree to give him one-half of all the sales of unsold territory that I make to men he puts me in communication with, or sends to me, we paying one-half car fare to such men. He is to send responsible men who will come in good faith, who will stay long enough to make a fair investigation—not less than one day.

5. After selling your own territory, (or before) you may go to other choice unsold territory and sell on above terms without purchasing more, and you have

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the right to correspond with other parties outside of your territory, and you can send and talk to men in territory that is sold, and when they come they can buy other territory, and they in turn can sell or send to me their neighbors and friends who will buy other territory. You are to use energy to further this enterprise, being fair with all concerned. If I, or my agents, or any customer, have pending sales with a man, you are not to sell to such man, expecting a per cent., but encourage such customers, and others will do likewise for you. Each are to find new men, not taking another's sale.

6. I will assist my customers to make sales with office help giving them one-half on the above terms, the lifetime of the patent (17 years from June 12, 1900), or as long as fairness is done \* \* \*.

W. R. WHITE,  
Seventy times patentee."

That the defendant White then executed to the plaintiff a so-called deed to the territory purchased by him in the words and figures following, to wit:

"To WHOM IT MAY CONCERN:—

Be it known that I, the undersigned, have sold to Thomas Moran the right to use and sell my invention for the farm and stock raiser, in and for the county of Ashland, in the state of Ohio, also my United States agency for all unsold states, and as this invention attracts the farmers' and speculators' attention, he will be apt to find buyers for unsold territory.

Now if the said Thomas Moran will bring or send such traders to me, or through his assistance, a sale is effected, by operating his gate in his own territory, and passing deeds that I have signed, I hereby agree to permit him to sell counties as cheap as if I were present, subject to my approval for which I will do favors of sending him circulars, etc. This is to be good for seventeen years from June 12, 1900, or as long as fairness is done. Selling good counties at \$500 each, but reports must be made every fifteen days.

A strict account of all farm rights, township rights, notes, money and property, shall be given by said

Thomas Moran and reported to patentee, but he is not to interfere in said White's sales by selling or trying to sell, to parties with whom White or his agents have pending sales, which is a violation, and in such case, this agency would be called in and the holder might be held for damages.

The holder is to do all he can to further the interests of the enterprise, but in the bounds of fairness to all concerned. This agency is not to be used in McLean county, Illinois, or to parties in said county, but only to parties becoming interested at this agent's exhibits while in his county or on the train. He also has the right to correspond with parties interested in his exhibit.

WILLIAM R. WHITE,  
Patentee."

Said count further avers that the defendant, White, also executed and delivered to the plaintiff a pretended deed to certain patents therein described, and that by reason of said false representations, and in reliance thereon, the plaintiff, in consideration of the delivery to him of the so-called deeds and said contract, executed and delivered to the defendant, White, his two promissory notes for the sum of \$750 each, dated November 21, 1903, payable to the order of W. R. White, and due in four and six months after date, respectively; that said White assigned said notes to the People's Bank of Bloomington, and that the defendants received the proceeds thereof; that prior to the commencement of this suit, the plaintiff demanded the return of said notes from the defendants, and tendered to them the contract and certificates of sale issued to him by said White, but they refused to surrender the same. The count concludes with specific averments that each and every representation therein alleged to have been made was false and untrue, and that by reason of the premises the plaintiff was defrauded, etc. The second count, which is similar to the first, charges fraud and deceit in substantially the same language, and also that the defend-

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ants, Hawes and Boruff, were agents and partners of White; that the promissory notes in question were assigned before maturity for a valuable consideration and without recourse; that it was the understanding between them that White was to receive one-half of the proceeds and Hawes and Boruff the remainder; that plaintiff had surrendered the contract and deeds prior to the commencement of the suit; and that the plaintiff had expended \$40 in efforts to sell territory under said contract. To the declaration, the defendants pleaded the general issue.

The facts involved appear from the record to be substantially as follows: Appellant, White, was the patentee and owner of several patents on an improved farm-gate, under which he sold territorial rights and appointed agents under contracts similar to that set out in the declaration. Appellants, Hawes and Boruff, were real estate agents in the city of Atlanta, and had, prior to November 21, 1903, purchased a county and agency from White under a contract of the character mentioned. Pursuant thereto they had furnished the name of appellee, Moran, as a probable purchaser of territory and an agency. White thereupon sent to Moran, by mail, a number of circulars, and copies of purported letters of recommendation, among which were the following:

## EXHIBIT Q.

“DEAR SIR:—I can give some reliable parties who can secure \$500 to \$3000, a paying business, choice locality of unsold territory. I have an article, or machine, valuable to all farmers and stockraisers. With the help of three farmers I made over \$65,000 clear in about seven months. Sales in one county were \$12,360. The like never known before. I give best bank references, fairness to all. \* \* \*

I went 85 miles from home to see what could be made out of a single county, selling the machines and townships, and in about seven months I sold \$12,360 in one county. Other men have sold several hundred dol-

lars worth in a single township. All this I will prove to any one who is interested enough to come to my office. My terms are as follows:—To a man who buys territory I sell the machine at net factory cost and give him the right to make them if he desires. All the proceeds from his territory are his alone, and I have no share in them. And in addition I allow my customers who make a sufficient investment \$1500 or more, a commission of 50 per cent. on all unsold territory which they sell, or in case I make a territory sale through my offices, to a party whom one of my customers has interested in the business, I will allow the commission the same as though the sale was made direct by the customer. \* \* \*

Respectfully yours,

Wm. R. White,

Seventy times patentee."

#### EXHIBIT C.

##### "EARNINGS OF W. R. WHITE'S CUSTOMERS.

Jones & Pritchard, Beaver Dam, Wis. \$35,500 in 7 mo. H. A. Knapp, Evansville, Wis., \$6,250 in 4 mo. Otto Messenbring, Cologne, Minn., \$2,250 in 3 mo. E. W. Requa, Beaver Dam, Wis., \$1,250 in 50 days. O. F. Weisenborn, Hancock Co., Ill., \$2,600 in 60 da. George Hanson, Monticello, Ill., \$5,500, in 5 mo. A. C. Ament, Ursula, Ill., \$4,500 in 3 mo. Two ladies in Bloomington, Ill., \$4,500 in 3 mo. T. E. Gregg, Wabash, Ind., \$2,250 in 8 wks. J. S. Dumbald, Quincy, Ill., \$3,500 in 8 wks. Enos Lloyd Jones, Hillside, Wis., \$2,625 in 4 mo. C. R. Gilham, Loraine, Ill., \$1,000 in 2 da. C. A. Emery, Carthage, Mo., \$2,000 in 40 da. C. W. Vandewalker, Wapato, Wis., \$4,250 in 3 mo. B. Hauser, Milwaukee, \$1,125 in one mo. T. J. Howser, Atlanta, Ill., \$4,900 in 2 mo. Miss Elizabeth Nees, Springfield, Ill., \$2,250 in 3 wks. J. B. DeFox, Quincy, Ill., \$1,250 in 4 da. R. W. Hughes, Oskaloosa, Ia., \$4,750 in 3 mo. H. C. Hawes, Atlanta, Ill., \$2,750 in 2 wks. Frank S. Horner, Rockford, Ill., \$2,250 in 3 wks. Miss Christy, Bloomington, Ill., \$1,750 in 30 da. A. C. Colean, Springfield, \$750 in 5 da.. H. B. Wait, Pringbor, Ia., \$2,500 in 6 wks. F. W. Hahn, Shemington, Wis., \$5,250 in 6 wks."

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## EXHIBIT P.

“SEPTEMBER RECORD BREAKER.

ONE HUNDRED THOUSAND DOLLARS (\$100,000).

Wonderful range of business on the W. R. White invention.

When Mr. White did \$50,000 worth of business in July, it was thought that high-water mark had been reached, but August showed a greater business, running to \$62,000, and this was thought to be about the limit, but the month of September shows that this great business is still growing and the sales for that month reached the magnificent amount of \$100,000.

Of this month's work the following men and women have earned commissions as follows;—R. W. Hughes, \$2,500; J. D. Fry, \$1,500; B. Polling, \$1,500; T. J. McAdams, \$1,500; C. R. Gilham, \$1,000; C. W. Vandewalker, \$3,750; O. F. Weisenborn, \$1,500; A Bloomington Lady, \$3,285; J. S. Dumball, \$1,000; Jones and Pritchard, \$7,000; L. E. Sargent, \$2,000; D. F. Ward, \$1,500; C. L. Jones, \$1,500; Phebe Swan, \$500; Effie Vandeliner, \$750; Miss Sales, \$750; F. W. Hahn, \$1,500; Another Bloomington Lady, \$750.”

The testimony of Moran is, in substance, that shortly after he received the circulars, etc., above mentioned, he went to Bloomington in response thereto; that he had a conversation with White at his office; that White explained his plan, and said that everybody who came there invested and made money; and showed him a wallet stating that it contained something like \$200,000 in notes, and several bank-books which indicated large deposits to his credit stating that they were the proceeds of the sales of territory; that he further stated that there was not very much money in selling gates, that the business was to sell territory as there was the most money in doing so; that if witness wanted to make anything he would have either to sell agencies or send some one to him who would buy; that all the witness would have to do was to send in the names of responsible persons and that he would do the rest; that in case witness failed he would make him no trouble, and ad-

vised him to invest while there and make money as all others who had invested had done. Moran further testified that while he was at White's office, and afterward at White's residence where he was invited to dine, he met a number of persons, all of whom were discussing the great value of territory and the large sums that had been made by those who had been fortunate enough to buy the same from White; that in White's office there was a bulletin board purporting to give the names of persons who had made large sums of money selling territory; that upon his return home to Lincoln on the following day, he learned that appellant Boruff, whom he had never met, was in the city and desired to see him and that he called upon him; that Boruff stated to witness that he understood that he had been at Bloomington the day before, and asked him what he thought about the investment; that witness replied that he thought pretty well of it, whereupon Boruff stated that White was a man of his word and that everything he said was true; that witness then asked him "What if a man could not make it?" to which Boruff replied that he had known White on some occasions to return the money to people who were not able to make anything, and that witness' note would be all right if he invested; that Boruff then produced the contract in question and inserted therein the words "Ashland county, Ohio," as descriptive of the territory conveyed, after which witness executed the same. Moran further testified that he thereafter made efforts to interest various persons and induce them to invest, but without success, and that he finally became convinced that the enterprise was a fraud, demanded the return of his notes, and on June 1, 1904, brought this suit.

An examination of the evidence contained in the unusually voluminous record, in connection with the contract, discloses, beyond question, that the large sums of money represented by White, through his circulars and personal interviews, to have been earned

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by former purchasers, were not realized through the manufacture or sale by them of the farm gates covered by the patents. A number of said purchasers testified that after they had invested, White stated to them, that it was not necessary that they should sell the gates but that all they had to do to make money was to solicit and induce their friends and others to enter into like contracts. It is also apparent that the rights to sell territory conveyed, were not intended by White to be exercised or utilized in the ordinary and legitimate way, but it was his purpose and desire that purchasers should limit their efforts to "drumming up" fresh customers for agencies and territory, by prevailing upon their relatives, acquaintances and friends to call at his office, in order that he and his assistants might, by taking advantage of their ignorance, credulity, cupidity, or taste for speculative ventures, induce them to invest in the so-called enterprise, and in their turn introduce and interest still others, and so on *ad infinitum*. The transaction here involved was therefore but a link in an endless chain, the length of which was determinable only by the number of future investors it was possible to secure from time to time. It is manifest it was inevitable that when the supply of dupes became exhausted, those who had been unable to unload their losses upon others would suffer.

This view of the enterprise is corroborated and well illustrated by the experience of Miss Elizabeth Nees, a school mistress residing in Springfield, Illinois, who purchased territory under one of the contracts in question. Her testimony shows that she became interested in the project through one Dumbald, who was working under a similar contract, and purchased Clay county, Indiana, giving therefor two notes for \$750 each, one of which was turned over to Dumbald under his contract, and the other retained by White. After purchasing she was informed by White that she would not have to sell gates but was expected to sell territory only; that in order to interest prospective purchasers

she was to state the case to them as it had been stated to her; to tell them that it was an investment of \$1,500 for which sum they would have to give their notes, and that if such persons afterward purchased she would receive one-half of the amount paid by them. She took two persons, Parks and Stickle, to Bloomington, both of whom invested. One of her notes for \$750 was thereupon returned to her together with one given by Stickle for a like sum. The evidence further discloses that one Fox who held a contract, induced one Shepherd to invest; that Shepherd in turn interested A. C. Colean and one Wright. That A. C. Colean interested J. H. Colean, and one Kincaid, and that Kincaid interested one Small and that all of them purchased territory. Colean was then given one each of the notes given by Shepherd and Kincaid. J. D. Fry upon investing gave three notes for \$500 each. He interested Davidson and Miller and received two of his own notes and was credited with \$250 upon one of the others.

The method in which holders of contracts received their compensation is thus described by counsel for appellant in their argument in this court:

"If an agent took a customer to White whose note was as good as the agent's note White would take two notes from the customer each for \$750 and would give to the agent one of his own notes. When the agent brought the second customer who gave notes as good as the agent's own note, then the agent got his second note. If the customer in White's opinion was not as responsible financially as the agent, then White kept the agent's note and gave to the agent one of the notes of the agent's own customer. After the agent had taken up both his notes, then he received as his pay one of the notes of his own customer whom he brought to White."

The enterprise thus conducted by White was clearly illegitimate and contrary to public policy, if not fraudulent, and merits the strongest condemnation. It may

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properly be classed with the numerous so-called "get rich quick" schemes with which the country is now unfortunately infested, and to which many ignorant but deserving citizens, many of them women, fall ready victims.

Appellee's right of recovery is not, however, predicated upon the illegality of the consideration for the notes given by him, but upon the alleged fraudulent and deceitful representations averred in the declaration. That White realized large sums of money in the furtherance of the scheme is obvious from its character and the evidence. It was also undoubtedly exceedingly profitable to those of his customers and confederates as were able to persuade any considerable number of persons to invest.

Among the misrepresentations averred by the declaration were those contained in the circulars above quoted, to the effect that Miss Elizabeth Nees had earned in commissions \$2,250 in three weeks; A. C. Colean, \$750 in five days; and J. D. Fry, \$1,500 in one month. These representations were material, they related to a past alleged fact or event. There is evidence to show that they were untrue; that they were known to White to be untrue when he made them; that they were made with the intent to deceive; that appellee was deceived thereby and acted upon them. If the jury believed these propositions were proved by the greater weight of evidence a right of action was established as against appellant, White. There are also facts and circumstances appearing in evidence which tend to show that appellants Boruff and Hawes who held an agency jointly, suggested the name of appellee to White as a possible customer; that Boruff went to Lincoln with the contract and by his representations to appellee aided in inducing him to execute the same; and, further, that he and Hawes jointly received, and claimed upon the trial to own, one of appellee's notes as their commissions upon the transaction.

If they had actual or constructive knowledge of the

fraudulent character of the enterprise, and with such knowledge, aided and abetted in its furtherance, and by means of false and untrue representations induced appellee to invest therein, they were *in pari delicto* with White in the fraud and deceit practiced and equally liable with him for any damages occasioned to appellee. Allin v. Millison, 72 Ill. 201. As the present judgment must be reversed we shall not discuss the weight of the evidence upon the question.

It will suffice to say that the court did not err in refusing to direct verdicts in favor of the defendants or either of them.

While appellee was testifying in his own behalf, counsel for appellants sought to show by him upon cross-examination, that he had no property out of which a judgment for the amount due upon the notes, if one were obtained, could be made by execution, but the court held that such evidence was incompetent under the issues and refused to admit the same. The suit at bar was instituted for the recovery of damages alleged to have been sustained by appellee by reason of his having been deceived and defrauded, whereby he gave the notes described in the declaration. He admitted that he had never paid the same or any part thereof. Substantially the only damages he claimed or was shown to have sustained, were such as would be occasioned by his being compelled to pay the notes. It is obvious that if the notes were valueless by reason of his inability to pay the same, appellee could not have been damaged to the extent of their face value.

The evidence offered was therefore competent in mitigation of damages, and the court erred in refusing to admit the same. Thayer v. Manley, 73 N. Y. 305; M. E. R. Co. v. Kneeland, 120 N. Y. 134; Lyle v. McCormick, 108 Wis. 82. Such error was clearly prejudicial.

Complaint is made of other rulings of the court. In a number of instances, for the purpose of showing that the agencies and territorial rights were not valuable

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as represented by appellant White prior to the time of the purchase by appellee, witnesses for appellee were permitted to testify as to alleged misrepresentations made by White to them and as to losses incurred by them after the making of said misrepresentations to appellee. This was error. To entitle appellee to recover under his declaration, it was necessary for him to establish that fraud and deceit were practiced upon him prior to the time he executed the contract and notes in question, and also that appellants then knew that the statements made by them were untrue. While evidence as to the transaction between White and parties other than Moran prior to the execution of the notes and contract here involved was competent (*Allin v. Millison, supra*), this is not so as to the subsequent transactions. The evidence of purchasers of territory under patents other than those in which rights were sold to appellee was also incompetent.

The first instruction given for appellee was faulty in that, while purporting to enumerate the prerequisite facts to warrant a recovery, the essential elements that the representation must have been material and have related to present or past transactions, were omitted. The instruction authorizes a recovery if any statement was shown to be untrue without regard to its materiality or whether it related to then present, past or future events. The other criticisms of this instruction were not warranted. There was, we think, sufficient evidence upon which to base appellee's second instruction. Appellants' first refused instruction was properly refused. While some of the comments of counsel for appellee in his closing argument, of which complaint is made, were not wholly unjustifiable, other portions of the same were not based upon the evidence, and were so unduly severe and intemperate as to tend unduly to arouse the passion and prejudice of the jury. In fact the limit of propriety was reached. While counsel have the right fully and freely to discuss the evidence in a case and to draw and express all reason-

able and legitimate inferences therefrom, great care should be exercised to refrain from indulging in excessive invective and epithets, and to keep within the record. Verdicts are frequently endangered by the opposite course.

Because of the errors indicated, the judgment must be reversed and the cause remanded for another trial.

*Reversed and remanded.*

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The Central Illinois Construction Company v. John M. Lloyd.

1. **VARIANCE**—*how question of, should be raised.* A variance cannot be raised for the first time on appeal; advantage thereof should be taken in the trial court.

2. **RAILROAD CROSSINGS**—*upon whom duty lies to ring bell, etc.* The duty of ringing a bell or sounding a whistle at railroad crossings is not imposed upon the conductor in charge of the train but is cast upon the person or persons in charge of the engine.

3. **NEGLIGENCE**—*when doctrine of imputed, does not apply.* The neglect of the persons in charge of an engine to ring a bell or sound a whistle at a railroad crossing is not imputable to the conductor in charge of the train to which such engine is attached.

Action in case for personal injuries. Appeal from the Circuit Court of Montgomery county; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

J. H. ATTERBURY, for appellant.

JETT & KINDER, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This was a suit in case by appellee against appellant and the St. Louis & Springfield Railway Company to recover damages for injuries alleged to have been sustained by appellee by reason of a collision of a train on the Big Four Railroad, of which appellee was con-

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ductor, with a train operated by appellant, while constructing a railroad for the St. Louis & Springfield Railway Company at a crossing in Gillespie.

The original declaration charges in substance that the appellant so operated its train of cars and engine that the same was left standing over and across the crossing aforesaid without any lights, signals or warnings of any kind, and that appellee was running his train on the Big Four Railroad from East St. Louis through Gillespie, and that while passing along said Big Four tracks, said train struck, with great force, the train left standing across the track by appellant, whereby plaintiff was injured, etc.

The second count charges that the St. Louis & Springfield Railway Company was a corporation organized under chapter 114 of the Revised Statutes of Illinois concerning railroads; that it was constructing its line from Carlinville to Staunton and had employed appellant to lay its track, etc.; that appellant was engaged in such construction, that it was necessary to cross the Big Four track at Gillespie, and that the Big Four Company objected to the place and manner of crossing contemplated; that it was unlawful for the St. Louis & Springfield Railway Company to construct the crossing across the Big Four track until the place and the manner of the same had been fixed and determined by the Board of Railroad and Warehouse Commissioners in accordance with the statute entitled "An Act in relation to crossings of one railway by another, and to prevent danger to life and property from grade crossings;" that the St. Louis & Springfield Railway Company, with knowledge that the place and manner of the proposed crossing was objected to by the Big Four Company, proceeded, through appellant, to place said crossing in the night time, in order to evade the provisions of law; that in consequence of the said crossing having been so installed, the plaintiff's train ran into the crossing, and was derailed on account of said crossing having been so placed, by reason of which derailment the plaintiff was injured, etc.

The third count is like the second except that it charges that while appellant was engaged in placing the crossing in question, it was possessed of a train and locomotive, and left the same standing on the crossing so unlawfully installed without any lights, signals or warning, and that in consequence of the crossing having been so unlawfully installed and of said cars and locomotive being negligently left standing on the crossing, the plaintiff, while operating his train, struck the cars standing on the crossing, whereby he sustained injuries, etc. The general issue was pleaded by both defendants and upon a trial of the issues joined, a verdict was returned against appellant for \$1,000 and the defendant St. Louis & Springfield Railway Company found not guilty.

The evidence tends to establish the following facts: The tracks of the St. Louis & Springfield Railway Company cross those of the Big Four Company on a public street in Gillespie. At the time the crossing was installed, the Big Four had sent a crew with an engine to prevent it but it was installed notwithstanding their efforts to prevent. On the night of the accident, which occurred about a week after the installation of the crossing, a Big Four train, in charge of appellee as conductor, and running at a rate of from 20 to 25 miles an hour, approached from the west and collided with a construction train of appellant, which, after having stopped for some 10 or 15 minutes, within 50 or 100 feet south of the crossing, started north to pass it. While said train was moving slowly over the crossing, the approach of the Big Four train from the west was observed, whereupon the engineer in charge of the construction train reversed his engine and attempted to back off the crossing, but before he was able to do so, the Big Four train struck a car of rails in the construction train, causing appellee, who was at that time riding in the caboose of the former train, to be thrown against a table and upon the floor of the car, injuring his abdomen. While they may have

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known that appellant intended placing the crossing in question, none of the crew of the Big Four train knew that it had in fact been installed, and the engineer of such train failed to observe that the track was obstructed until his engine was about fifty feet from the crossing.

During the time the construction train was standing south of the crossing, the conductor in charge had gone to a neighboring livery stable upon an errand. Upon his return to the train he immediately signaled the engineer to proceed north toward the crossing. It does not appear that he made any effort to ascertain whether the way was clear or whether the crossing could be passed with safety. No lookout was stationed at the north end of the train nor was any light or other signal displayed thereon. Duffy, a night policeman at Gillespie, testified that immediately prior to the collision, he was sitting close to the crossing and saw the Big Four train approaching at the rate of twenty miles an hour about two or three miles away, and that finding no lookout at the north or head end of appellant's train, he was compelled to run back to the engine to warn the engineer. From the foregoing facts, which were practically uncontested, the jury was warranted in finding that the conduct of those in charge of appellant's train constituted not only a violation of section 12 of the statute regulating the operation of railroads (Rev. Stat. 1905, 1578), but negligence in law as charged in the first count of the declaration. *Morris v. Stanfield*, 81 App. 264; *R. Co. v. Goyette*, 133 Ill. 21; *R. Co. v. Voelker*, 129 Ill. 550.

It is urged, however, that no recovery could be had under such count, as it is therein alleged that appellant left its train standing still upon the crossing, while the proof shows that said train, at the time it was struck, was moving over the crossing. It is true that in this particular a variance exists between the allegations and the proof. The gist of the negligence charged in said count is, however, not

permitting of the train to stand upon the crossing, but the failure to give warning in some manner of its presence there. Whether under these circumstances, the train was standing still upon the crossing, or slowly moving over the same, was therefore immaterial, as appellant would be liable in either event. Furthermore, the variance was of such character that advantage of the same should have been taken upon the trial and the objection cannot be properly raised for the first time in this court.

It is also urged that the verdict cannot be sustained for the further reason that the evidence discloses that appellee was guilty of contributory negligence in that he failed to cause a bell to be rung or whistle to be sounded by the engineer or fireman of his train for the distance of at least eighty rods from the crossing in question, that he failed to bring the train to a full stop within 800 feet therefrom, as required by the statute, and further that he permitted his train to be run at a rate of speed prohibited by an ordinance of the village of Gillespie. Appellee admitted upon the trial that he knew that the St. Louis & Springfield Railroad Company was intending to put in a crossing at the point in question, and that when his train passed there a few nights previous to the accident he observed from the noise of the wheels of the caboose in which he was riding, that the crossing had been placed. It is insisted that while he may not have known that a connection of the tracks of the two railroads had been actually made, he had such knowledge as should have put him on inquiry; that having constructive notice of the crossing, it became his duty to have given the statutory warning and caused the train to be stopped before reaching the crossing. We do not understand that the duties referred to are devolved upon the conductor of a train either by law, custom or rule. They are peculiarly and necessarily those of the person or persons in charge of the engine and the statute evidently so

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contemplates. By section 6 of the statute regulating the operation of railroads in this state it is provided that "Every railroad corporation shall cause a bell and a steam whistle to be placed and kept on each locomotive engine and shall cause the same to be rung or whistled by the engineer or fireman, at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached" (Rev. Stat. 1905, 1578), and by section 13, that "Every engineer or other person having charge of an engine," who shall violate the provisions of section 12, which requires that all trains when approaching a crossing shall be brought to a full stop, etc., shall be subject to a penalty. Rev. Stat. 1905, 1579. It is also apparent that the performance of such duties by a conductor would be impracticable, if not impossible.

If there was any neglect of duty or violation of the statute in these respects, it is obvious that those in charge of the engine were alone guilty, and their negligence cannot be imputed to appellee. R. Co. v. Vipond, 212 Ill. 199. We are satisfied that appellee was not guilty of any negligence which contributed to his injuries.

The evidence so fully established a right of recovery under the first count of the declaration that it will be unnecessary to determine the question raised and argued relative to the remaining counts.

The judgment of the Circuit Court is affirmed.

*Affirmed.*

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### Abraham Barker v. Pearl J. Ronk.

1. MALICIOUS PROSECUTION—*when peremptory instruction should not be given in action for.* A peremptory instruction should not be given in an action for malicious prosecution where the facts relied upon as showing probable cause are controverted and the evidence as to their existence is conflicting.

2. MOTIVE—*what evidence competent to establish.* In an action for malicious prosecution, the defendant may himself testify as to his motive and may state that he was not actuated by malicious ill will or desire to harass the plaintiff in instituting or conducting the proceedings complained of, and that he honestly believed in the plaintiff's guilt or liability.

3. NEW TRIAL—*when newly discovered evidence not ground for.* Newly discovered evidence is not ground for a new trial where it does not appear that the evidence referred to could not have been produced on the trial by the exercise of due diligence.

Action in case. Appeal from the Circuit Court of Sangamon county; the Hon. R. B. SHIRLEY, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

PATTON & PATTON, for appellant.

JAMES E. DOWLING and ROBERT H. PATTON, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case for the recovery of damages for alleged malicious prosecution and false imprisonment. The plaintiff, upon a trial by jury, recovered a judgment for \$500 from which this appeal is taken by the defendant.

The evidence shows that appellee and one Evans, who were employed in a coal mine at Girard, went to Springfield on a Saturday evening, arriving there the following morning. They took with them a lot of junk consisting of iron, rubber, brass and some brass boxing which they picked up along the railroad right of way. Upon their arrival at Springfield, they left the junk in a feed yard and called upon appellant, who was a junk dealer, and took him to see the junk with a view of selling it to him. Appellant refused to buy the boxing, but bought the remaining junk including some brass weighing from 100 to 130 pounds, all of which was placed in a shed in appellant's junk yard. It being Sunday, appellant was unable to then weigh

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the junk, but paid appellee on account of the purchase the sum of five dollars, agreeing to pay the balance the next time appellee came to Springfield, with a load of junk. On the following morning appellant went to his yard for the purpose of weighing the junk and found the brass missing, and junk of the value of \$1.18 only remaining. Appellee returned to Springfield about two weeks later with another load of junk. After selling the same to Morris, also a junk dealer, he called upon appellant and demanded the balance due him, whereupon appellant accused him of having returned to the yard after selling him the first load of junk, and stolen the brass.

Some altercation followed, after which appellant caused the arrest of appellee upon the charge of larceny. Appellee was taken to the county jail, where he remained for two days. A warrant was then issued for his arrest, upon complaint of appellant. He was taken before a police magistrate and upon a hearing discharged, thus terminating the prosecution.

The first ground urged for reversal is that the court erred in refusing a motion made by the defendant at the close of all the evidence, to instruct a verdict of not guilty. It is insisted that a clear preponderance of the evidence failed to show that appellant did not have probable cause for causing the arrest and prosecution of appellee; in other words, that the circumstances under and by which appellant sought to justify such action were sufficiently strong in themselves to warrant a cautious man in the belief that appellee was guilty of the offense charged (*Palmer v. Richardson*, 70 Ill. 543); and further, that no facts were established by the evidence tending to show malice, or from which malice could probably be inferred.

Appellant testified that on the day of and prior to the arrest, he saw appellee going to Morris's junk yard; that he accosted him and the following conversation took place: "I says, 'You are the fellow I am looking for, do you remember the time you was

here last? You know that brass you left at my place. No sooner you left the yard when the brass was gone and you took them. I paid you the money on that stuff and I want the money on the brass.' He denied taking it, then I says, 'You can't tell me that because nobody else knowed anything about that brass being there, and I have got lots of tools scattered around the yard and I never miss anything; nobody took this stuff but you,' and he said he sold a load of stuff to Morris and he would go down there and get the money and come back and straighten up with me. I waited for him to come back and he didn't come back and I was standing there with two of my men and told them to watch his team so he didn't get away, and I went over to the police station. After I waited, I think, about fifteen or twenty minutes I told the police to go and get him."

Charles Barker and one Traeger, employes of appellant, the former a cousin, testified that they were present at the interview and substantially corroborated appellant's version of the conversation. Appellee denied that either the interview or the conversation ever occurred, and both he and Evans further testified that at the preliminary examination before the magistrate, appellant did not testify to having had such a conversation.

It is urged by counsel for appellant that the fact that appellee offered the junk for sale on Sunday, his anxiety to dispose of it immediately, his possession of the railroad boxing, the further fact that the brass was stolen so soon after its purchase, and that appellee failed to return with another load of junk as he had agreed, together with his agreement and failure to get the money from Morris and return and pay for the stolen brass, constituted reasonable grounds for suspecting appellee of the theft. It is manifest that the circumstances detailed other than the alleged conversation, would not in themselves be sufficient to constitute probable cause.

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Upon the question as to whether such conversation took place, the evidence was conflicting and while the preponderance of the evidence, as it appears in the printed abstract, apparently supports appellant's testimony in that respect, we are not prepared to say that it so clearly does so, as to warrant our disturbing the verdict of the jury who saw and heard the witnesses testify.

Where the facts relied upon as showing probable cause are controverted and the evidence as to their existence is conflicting, it is very clear that they must be settled by the verdict of the jury before the court can apply the law to them. In such case the practice in this state, and many others, has been to treat it as a mixed question of law and fact to be submitted to the jury under instructions as to what amounts, in law, to probable cause. *Schattgen v. Holnback*, 149 Ill. 652; *Elliott on Evidence*, vol. 3, sec. 2473.

When all the facts and circumstances proven show a want of probable cause for the arrest and imprisonment of the plaintiff on a charge of crime, the jury may take this fact into consideration, and from it infer malice, not as a matter of law, but as a conclusion of fact. *Roy v. Goings*, 112 Ill. 656.

It is next urged that there was error in the action of the court in sustaining an objection to the following question put to appellant: "Well, I will ask you to state what was the condition of your mind at the time you swore out the warrant with respect to believing or not believing that this man had stolen the brass." The ruling in question was erroneous. The defendant may himself testify as to his motive and that he was not actuated by malice, ill will, or desire to harass the plaintiff, in instituting or conducting the proceedings complained of, and that he honestly believed in the plaintiff's guilt or liability. 9 A. & E. Ency. 695, and cases cited; *Sherburne v. Rodman*, 51 Wis. 474; *Heap v. Parrish*, 104 Ind. 36.

The error, however, could not have affected the ver-

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dict, as appellant, upon cross-examination, testified as to a conversation with appellee prior to the arrest, in which he stated to him in detail the grounds for his belief that appellee was guilty of the theft.

The trial court properly held that the affidavit of appellant as to the newly discovered evidence of one Morris was insufficient to warrant the granting of a new trial. It does not appear therefrom that the evidence referred to, could not have been produced on the trial by the exercise of due diligence. Although the cause had been pending for over eight years it is not averred that any effort was made by appellant during that time to collect his evidence.

The judgment of the Circuit Court will be affirmed.

*Affirmed.*

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#### Illinois Central Railroad Company v. Albert Rothschild.

1. **PASSENGER AND CARRIER—when relation exists.** A person in charge of cattle which are being transported for hire is a passenger where he travels upon a freight train by consent of the carrier.

2. **PASSENGER AND CARRIER—what makes *prima facie* case of negligence.** Proof that the plaintiff was a passenger for hire, that the car in which he was riding collided with another train of the defendant, while the plaintiff was in the exercise of due care, and that he was injured by reason of such collision, makes a *prima facie* case of negligence on the part of the defendant.

3. **PASSENGER AND CARRIER—what essential to absolve latter from liability for negligence where *prima facie* case has been made.** Where the plaintiff has made a *prima facie* case, the burden is cast upon the defendant to show that the injury in question was not caused by a neglect by the defendant of its duty toward the plaintiff. The defendant is not bound to show that the injury in question resulted from "an unavoidable accident" or from some cause against which human prudence and foresight could not have provided.

4. **PASSENGER AND CARRIER—when erroneous instruction as to extent of duty of latter will not reverse.** Notwithstanding an instruction is erroneous in that it required that the defendant exercise a higher degree of care than that imposed by law, a reversal will

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not follow where the defendant did not by its evidence meet and overcome the proper legal burden imposed upon it.

5. **REMITTITURE**—*when does not cure excessive verdict.* An excessive verdict cannot be cured by a remittitur where the damages are so large as to compel the conclusion that the jury were either misled by the rulings of the court or were unduly influenced by sympathy, prejudice, partiality or misconception.

6. **DAMAGES**—*what evidence incompetent upon question of.* It is error to permit a plaintiff suing for personal injuries to state in answer to a direct question that he has a family consisting of a wife and several children.

7. **DAMAGES**—*what evidence incompetent upon question of.* It is incompetent to permit a plaintiff suing for personal injuries to show what were his business qualifications prior to his injury.

8. **DAMAGES**—*what evidence competent under allegation of special.* In an action for personal injuries and under an allegation of special damages, it is competent to show a contract held by the plaintiff prior to his injury and the amount of his past and estimated future profits and earnings therefrom.

9. **PHYSICAL CONDITION**—*how proof of, may be made.* It is competent to show the condition of nervousness by witnesses other than experts.

10. **ARGUMENT OF COUNSEL**—*what improper upon.* It is improper for counsel in an action for personal injuries to state to the jury the statutory limitation of damages for wrongfully causing death.

11. **NEW TRIAL**—*when fainting of plaintiff in presence of jury not ground for.* The fainting of the plaintiff in the presence of the jury is not ground for a new trial in the absence of proof of simulation.

Action in case for personal injuries. Appeal from the Circuit Court of Mason county; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

NORTRUP & WILLIAMS and LEMON & LEMON, for appellant; JOHN G. DRENNAN, of counsel.

LYMAN LACEY, JR., CHARLES NUSBAUM and BEACH, HODNETT & TRAPP, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case, by appellee against appellant, for the recovery of damages for personal injuries

alleged to have been received by appellee while a passenger upon one of appellant's railroad trains. A trial by jury resulted in a verdict and judgment in favor of the plaintiff for \$25,000, to reverse which the defendant prosecutes this appeal.

The declaration to which the plea of the general issue was interposed, consists of ten counts, each of which aver, in substance, that the plaintiff, as agent for one Hubley, shipped upon one of defendant's trains known as No. 64, two carloads of cattle; that he was in charge of the same and riding upon the caboose of said train by the direction and consent of the defendant, and as a passenger for hire and reward. The first five counts further charge that the servants of the defendant in charge of said train, carelessly, negligently and recklessly ran and drove the engine of another train known as No. 54, at a high rate of speed, upon and against the caboose in which the plaintiff was riding, injuring him, etc. The sixth count charges negligence in providing defective and insufficient couplers between two of the cars of train 64 by reason whereof the train broke in two, causing the air brake to set, the train to stop, and train 54 to collide with the caboose; the seventh, in running the two trains upon a schedule time too close together; the eighth, the failure of those in charge of the rear train to observe the signals to stop given them by those in charge of the forward train; the ninth, the failure of those in charge of the forward train to give signals of warning to those in charge of the rear train; the tenth, the failure of those in charge of the forward train, after having knowledge thereof, to awaken the defendant and warn him of the approach of the rear train. In addition to the usual allegations as to damages, each count avers that the plaintiff, in consequence of the injuries received by him was prevented from attending to his usual business and from earning large emoluments; that for two years prior to the time of the injury he had been employed by one Hubley to care for

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the property and interest of her minor child, and that he was also employed by said Hubley under a special contract whereby Hubley furnished all money necessary to buy, feed and sell cattle, and appellee performed the labor in buying, raising, feeding and selling the said cattle, and the said Hubley and appellee divided equally the profits arising from said business; that he received for his services in looking after the interest of the minor son in the land, \$60 per month; that his share of the net profits of the buying, feeding and selling cattle under the contract with Mrs. Hubley amounted to \$3,000 per year; that by reason of his said injuries he is and ever will be wholly incapacitated from attending to his said business or any part thereof; and is and will be unable to earn or receive any of said wages or profits or any part thereof.

The evidence shows that appellee, as agent for one Hubley, loaded and shipped two loads of cattle upon appellant's cars to be carried from Mason City, Illinois, a station upon its road, to Chicago. The cars were attached to a stock train known as No. 64, which left Mason City at 3:30 o'clock p. m. Upon the arrival of the train at Clinton, appellee, who accompanied and had charge of the cattle while in transit, went to bed in the caboose attached to the train. At about midnight, after the train had left Clinton, and while it was running at the rate of thirty miles an hour, the coupling between two of the cars parted, causing the air brakes to set automatically and the train to stop. Closely following said train No. 64 was a merchandise train known as No. 54, which was running at the rate of fifty miles an hour and slightly ahead of its scheduled time. When No. 64 stopped, the brakeman upon the rear end of the train ran back upon the track and by means of fusees and a lantern endeavored to warn No. 54 in time to avert a collision. His efforts were unsuccessful and the latter train ran into and collided with the caboose in which appellee was sleeping, causing the injuries for which this suit is brought.

It is urged that appellee was not shown by the evidence to have been a passenger and certainly not a passenger for hire.

There was evidence tending to show that appellee had in his possession at the time he was injured a document which he denominated as a "drover's pass," and that after he had retired to the caboose, the conductor in charge of the train examined the same and made no objection to appellee's continuing to ride. One traveling by the consent of a railroad company upon a freight train in charge of cattle, which are being transported for hire, is a passenger for hire whether supplied with a drover's pass or not. *R. Co. v. Beebe*, 174 Ill. 13; *R. Co. v. Anderson*, 184 Ill. 294.

In the absence of any proof to the contrary, the jury were warranted in assuming from the fact that the cattle were being carried, that someone had agreed to pay for their transportation. In such case the consideration for the passage of appellee who was in charge of them was the service he rendered in caring for them, or the charge made against him or his employer for carrying the cattle. *R. Co. v. Beebe*, *supra*. The admission of parol evidence of the contents of the shipping contract or drover's pass or ticket, as to which complaint is made, could not therefore have harmed appellant.

The proof that appellee was a passenger for hire, that the car in which he was riding collided with another train of appellant, while appellee was in the exercise of due care, and that he was injured by reason of such collision, made a *prima facie* case of negligence on the part of appellant. *Traction Co. v. Wilson*, 217 Ill. 47, and cases cited. The burden was thus cast upon appellant to show that the collision was not caused by a neglect of its duty toward appellee; that is, to do all that human care, vigilance and foresight can reasonably do for his safety while a passenger, consistent with the mode of conveyance, the practical operation of its road, and the exercise of its

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business as a carrier. *R. Co. v. Polkey*, 203 Ill. 225; *Traction Co. v. Wilson*, *supra*. If the presumption of negligence thus established was not overcome by appellant, appellee was manifestly entitled to a verdict under the counts of his declaration which charge negligence generally, and it is unimportant whether or not he has established the averments of those which aver particular acts of negligence. *R. Co. v. Cotton*, 140 Ill. 486.

The third instruction given for appellee was erroneous in that it, in effect, told the jury that the rule of *res ipsa loquitur* above stated cast upon appellant the burden of proving that the injury resulted from "an inevitable accident or from some cause against which human prudence and foresight could not have provided." This instruction imposed upon appellant a much higher degree of care than is warranted by law. In the exercise of human prudence and foresight, many precautions suggest themselves which would greatly lessen the danger of travel by rail, the adoption of which, however, would be utterly inconsistent with the practical operation of a railroad and the proper exercise of its business as a common carrier. To compel a railroad to adopt the same, would in many instances greatly hamper, if not practically destroy, its usefulness. But no harm could have been occasioned by the giving of the instruction for the reason that appellant failed to meet and overcome the proper legal burden imposed upon it. It is conceded by counsel that the accident was due to the uncoupling of two of the cars in train No. 64. Assuming that this was the direct cause of the collision, it is manifest that the cars would not ordinarily have become uncoupled had due care been exercised in the selection of proper coupling appliances and in reasonable inspection and proper handling of the same. It is a matter of common knowledge that cars will not become uncoupled through atmospheric changes or superhuman or supernatural agencies, but that such occurrences are al-

most invariably due to one or more of the causes mentioned. It is further contended that the court erred in its rulings upon others of the instructions given and refused, and upon questions of evidence, all pertaining to the cause of the accident and appellant's liability therefor. Such of the rulings as were erroneous could not have prejudiced appellant for the reason that under the foregoing views its liability was clearly established by the uncontroverted facts.

We are of opinion that the contention that the court erred in its rulings upon questions affecting the amount of the verdict, is well founded.

Although appellee was seriously and permanently injured, the amount awarded as damages is so unusually large that we cannot escape the conclusion that the jury were either misled by the rulings of the court, or were unduly influenced by sympathy, prejudice, partiality or misconception. A number of errors were committed upon the trial, of which we shall notice but the following: Over the objections of appellant, appellee was permitted to state in answer to a direct question that he had a family consisting of a wife and two children. The court has heretofore held that the admission of similar evidence in an action of this character was manifest error. Ry. Co. v. Omer, 101 App. 155. Appellee, while testifying, was asked whether since he was injured, he was able to ride or mount a horse; to which he replied "No, and I don't think I ever will be." A motion by appellant to exclude the answer was interposed and overruled. This was also manifest error. Witnesses were permitted to testify over the objections of appellant, as to the business qualifications of appellee prior to his injuries. This too was error. The evidence of his condition at such time should have been confined to the state of his health. Another witness, not an expert, after stating that since his injuries appellee was nervous at all times, volunteered the further statement that he, the witness, attributed such condition to the fact that appellee was a cripple, and to the shock caused

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by the collision; which answer the court improperly refused to strike from the record upon motion. It was competent to show nervousness by a non-expert (*Dimick v. Downs*, 82 Ill. 570), but the uncalled for opinion of the witness was incompetent and would have been if given by a qualified expert. *R. Co. v. McCollum*, 122 App. 531. It was obviously so when volunteered by a layman.

We think that the evidence as to the contract of appellee with Mrs. Hubley and the amount of his past and estimated future earnings and profits therefrom, was competent under the averment of the declaration of special damages. *City v. O'Brennan*, 65 Ill. 160; *R. Co. v. Friedman*, 146 Ill. 583; *R. Co. v. Meech*, 163 Ill. 305; *R. Co. v. Barber*, 77 App. 257; *R. Co. v. McDonnell*, 194 Ill. 82.

It was improper for counsel for appellant to state to the jury in argument the statutory limitations of damages for wrongfully causing death, and the court properly sustained an objection thereto.

Affidavits presented in support of the motion for a new trial disclose that at the close of the testimony of appellee, and as he was leaving the witness stand, he suddenly fell to the floor, crying out as though in pain, and then relapsed into an apparent fainting condition and that he was at once surrounded by a number of relatives and friends, whereby considerable excitement ensued. While in the absence of any proof that the party was feigning, we are not prepared to hold that such an incident would be ground for disturbing a verdict, in the present instance it tended to and doubtless did arouse the sympathies of the jury, and may have caused them to award greater damages than they would have otherwise.

Be that as it may, the damages awarded seem to us to be clearly excessive, and we are satisfied that this is not a case where a *remittitur* remedied the evil. *R. Co. v. Binkopski*, 72 App. 22.

The judgment is reversed and the cause remanded.  
*Reversed and remanded.*

**Verona R. Munger, Executor, v. Ethel R. Munger.**

1. **ADOPTION OF CHILDREN—when petition for, sufficient.** A petition for adoption is not defective in failing to allege that the child sought to be adopted was a foundling where it is set up that the parents of the child were dead and that she had no guardian or next of kin living in this state capable of giving consent to adoption.

2. **ADOPTION OF CHILDREN—when orders entered upon, may not be attacked.** Where an order of adoption shows that the court had full jurisdiction, the same cannot be collaterally attacked.

Contested claim in court of probate. Appeal from the Circuit Court of McDonough county; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

F. B. SWITZER, for appellant.

CHARLES W. FLACK, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal by the executor of the will of John D. Munger, deceased, from an order of the Circuit Court awarding to Ethel R. Munger, formerly Ethel Reid, as the child of the testator, the sum of \$683.50. It was stipulated by the parties in interest that Ethel was not related to the deceased by consanguinity, and that she had lived with him from the date of the adoption proceedings hereinafter referred to until the time of his death.

The primary question presented by the record for consideration is whether or not appellee was the legally adopted daughter of the deceased. The evidence offered upon this issue in behalf of appellee consisted of a petition filed by the deceased in the County Court of McDonough county, on November 5, 1895, for the adoption of appellee, whose name was then Ethel Reid, and the change of her name to Ethel R. Munger, together with the order of the court entered upon the

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same day granting the prayer of the petition. The petition is regular in form and states all the facts necessary under the statute to give the court jurisdiction. The order finds that the facts set forth in the petition are true. This constituted a legal adoption. *Watts v. Dull*, 184 Ill. 86; *Kennedy v. Borah*, 226 Ill. 243.

It is insisted by appellant that the order of adoption is invalid and void for the reason that it fails to expressly find whether or not appellee was a foundling. A foundling is defined to be "a new-born child, abandoned by its parents, who are unknown." Rapalje & Lawrence's Law Dict. 451. The petition alleges that the order finds that the parents of the child were dead and that she had no guardian or next of kin living in the state, capable of giving consent. The status of the child was thus sufficiently shown under the statute. It does not appear from the record that the court had not full jurisdiction to enter the order, and its validity cannot therefore be attacked collaterally. *Barnard v. Barnard*, 119 Ill. 92.

It is further urged that appellee is not entitled to the award because the record fails to disclose that she resided with the deceased at the time of his death; that the word "living" used in the stipulation does not necessarily mean residing as required by the statute. The contention is captious and without merit. Other reasons are suggested in the brief of counsel why the award was improperly allowed. Counsel has not seen fit to argue the same, and they must be regarded as waived.

The judgment of the Circuit Court will be affirmed.

*Affirmed.*

**Illinois Central Railroad Company v. Lizzie Scheevers,  
Administratrix.**

1. ORDINANCE—*when not to be held unreasonable.* When municipal authorities have adopted an ordinance, before a court is justified in holding the same to be invalid, the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property must be made clearly to appear.

2. ORDINANCE—*limiting speed of vehicles; to whom applies.* An ordinance which limits the speed of vehicles to six miles per hour, applies to a fire marshal driving to a fire.

3. CONTRIBUTORY NEGLIGENCE—*when violation of ordinance constitutes.* A person injured by colliding with a railroad train is guilty of contributory negligence where at the time of such collision he was driving a vehicle in excess of the speed permitted by ordinance.

Action in case for death caused by alleged wrongful act. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Reversed, with finding of facts. Opinion filed June 1, 1907.

SHUTT, GRAHAM & GRAHAM, for appellant; JOHN G. DRENNAN, of counsel.

J. A. BLOOMINGSTON, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court:

This is an appeal from a judgment on the verdict of a jury, rendered in the Circuit Court in favor of appellee and against appellant, for the sum of \$2,500.

The declaration in its various counts alleges that the plaintiff's intestate who was fire marshal of the city of Springfield, while driving to a fire on the night of January 10, 1905, was killed by a collision with one of the defendant's switch engines at Seventh and Madison streets in said city. The negligence charged in the several counts upon which the cause was submitted to the jury, was the failure to give warning by

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ringing a bell, the failure to keep a headlight burning, and running at a rate of speed in violation of an ordinance then in force in the city of Springfield, limiting the speed of passenger trains to twelve, and freight trains to six miles an hour.

The evidence shows that appellee's intestate, Scheevers, in company with his son and one Hamilton, in response to an alarm of fire, started from one of the fire engine houses in Springfield in a single buggy hitched to a horse which was driven by the deceased. He drove rapidly north until they arrived within a block of appellant's railroad tracks which ran east and west on Madison street. The deceased then drove at a gallop around and past a hook and ladder truck which preceded them, and upon reaching appellant's second south track, collided with one of its engines. The deceased was thrown from the buggy, causing injuries from which he died shortly thereafter.

At the time of the collision ordinances were in force in the city of Springfield which provided that no railroad company should permit to be run, within the limits of said city, any passenger train or car at a greater rate of speed than ten miles per hour, nor freight train or car at a greater rate of speed than six miles per hour; and further that the bell of each locomotive engine should be rung continually, while running upon any railroad track within said city; and every locomotive engine, car or train of cars, running in the night time on any railroad track in the city, should keep a bright and conspicuous light at the forward end of such locomotive engine, car or train of cars.

Upon the issues as to whether or not, at the time of the collision, the locomotive engine was running at a rate of speed in excess of that prescribed by ordinance, whether the head-light of the same was burning, and whether its bell was being rung, as further provided by the ordinance, the evidence was close and conflicting. If the jury believed the testimony of appellee's witnesses, we cannot say that they were not

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fully justified in finding that appellant was guilty of a violation of each of the foregoing ordinances.

The chief ground urged for reversal is that the deceased was at the time of his death, violating another city ordinance then in force, which limited the speed of vehicles to six miles an hour, and further provided that no person should heedlessly drive any animal so as to come into collision with any other vehicle or animal. It is insisted that such violation contributed to his death and, as a matter of law, constituted contributory negligence sufficient to bar a recovery by appellee.

The evidence shows that although the deceased may have had the horse under control at the time he was injured, he was nevertheless driving at a rate of speed in excess of that limited by the latter ordinance. Hamilton who was with him in the buggy testified that the horse was probably traveling at the rate of fifteen miles an hour when they reached the planking fifteen feet south of the track upon which the collision occurred. Four other witnesses estimated the rate at from ten to twenty miles an hour, and neither of the witnesses who saw the accident testified to a lesser rate of speed than ten miles an hour.

It is contended by appellee that the ordinance in question is unreasonable and hence should not be held to be here applicable; and that a fireman going to a fire is not bound by ordinances regulating speed unless he is specifically included within such enactment. While it has been held in several states that a fireman is not amenable to such ordinance, on the ground of public policy, and that such an ordinance is enacted merely to control those using the street for ordinary purposes, we are constrained to hold to the contrary. The ordinance is by its unequivocal terms applicable to all alike, and if reasonable, should and must be enforced. We recognize that it is essential that firemen should be allowed to reach the scene of a fire within the shortest possible time consistent with safety.

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to the public. It is equally true, however, that none, not even members of the fire department, should be permitted to drive over and along the public streets at a rate of speed which might endanger the lives and limbs of the public. When municipal authorities have adopted an ordinance, before a court is justified in holding the same to be invalid, the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property must be clearly made to appear. It should be manifest that the discretion interposed by the municipal authorities has been abused. C. & A. R. R. Co. v. Averill, 224 Ill. 516.

The city council of Springfield, in the exercise of the discretion reposed in it by law, did not see fit to except or exempt firemen from the operation of the ordinance in question. It may, therefore, be reasonably presumed that it was the judgment of that body that the interests of the public did not demand such exceptions or exemptions. The question as to what is demanded by public policy can best be determined by the legislative body which represents the public, and we are therefore reluctant to hold that the passage of the ordinance under consideration constituted so clear an abuse of discretion as to render the same unreasonable and void.

Appellee's intestate at the time he met with the injuries which caused his death was therefore violating a valid and binding ordinance of the city. That he would not have been injured otherwise is obvious. The ordinance was such a one as the city was authorized to enact, and therefore had the force and effect of a statute. Its violation by the deceased constituted, as a matter of law, a *prima facie* case of negligence on his part which was not overcome by the evidence. Such violation contributed to the injury which resulted in his death. "Contributory negligence is nothing more or less than negligence on the part of the plaintiff, and the rules of law applicable to negligence of a

defendant are applicable thereto." Beach on Contributory Negligence, sec. 161; Village of Clayton v. Brooks, 150 Ill. 97.

It follows that no recovery can be had for the death of appellee's intestate, notwithstanding the same was due in part to the negligence of appellant.

The judgment of the Circuit Court will therefore be reversed without remanding the cause for another trial.

*Reversed.*

Finding of fact: We find that at the time G. F. W. Scheevers received the injuries which resulted in his death, he was not in the exercise of due care and caution for his own safety, and that such lack of care contributed to said injuries.

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**James H. Galway et al. v. May B. Galway.**

**DECREE—when cannot be complained of.** A decree entered by consent is not properly the subject either of appeal or complaint by assignment of errors.

Partition proceeding. Error to the Circuit Court of Edgar county; the Hon. J. W. CRAIG, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

VAN SELLAR & VAN SELLAR, for plaintiffs in error.

H. S. TANNER, for defendant in error.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This writ is prosecuted to review a decree in partition rendered in a proceeding wherein defendant in error was complainant and plaintiffs in error defendants.

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Galway v. Galway.

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The facts involved are the following: William Galway died testate, leaving defendant in error, his widow, but no children or descendants of children, him surviving. The widow renounced the provisions of the will in her favor and filed a bill for the partition of the real estate of which her husband died seized, claiming certain interests therein, to which bill plaintiffs in error, who were legatees and devisees under the will, were made parties defendant. An answer denying that the complainant was entitled to the interest claimed by her, and a cross-bill setting up the interests of the parties as claimed by the defendants, were filed by them. Thereafter, on December 5, 1905, a decree was rendered by the chancellor, without the intervention of commissioners, partitioning the real estate between the parties and vesting the fee of each tract in the respective party to whom it was assigned. The decree provided that the fees of complainant's solicitors, in the sum of \$2,500, be apportioned between the parties according to their respective shares. On January 5, 1906, the defendants filed a motion seeking to vacate the portion of the decree relating to solicitors' fees upon the ground that the interests of the parties were not correctly set out in the bill. The chancellor overruled the motion, whereupon the defendants sued out this writ of error. It will be unnecessary to determine the propriety of the provision of the decree of which complaint is made, for the reason that we are of opinion that the decree in its entirety was entered by and with the consent of all parties in interest.

Upon its face it recites the presence of all the defendants by their solicitors; the entry of the appearance of the defendant, Cusack, and his consent that the decree might be entered; also, that the complainant and the defendants, other than Cusack, "have agreed as hereinafter found by the court." While it does not expressly recite that the parties consented to the allowance of the solicitors' fees, we cannot escape the

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conclusion that the decree was understood by all, including the chancellor, to have been a consent decree. Counsel for plaintiffs in error admit in their argument filed in this court, that they were present when proof was introduced as to the amount of fees to be allowed and the decree shows that they were present when the same was signed. It does not appear that any objection was interposed thereto until some thirty days thereafter, at which time the only reason assigned for the modification of the decree was that the bill did not correctly state the interests of the parties.

The claim that the decree or any of its terms was entered without the knowledge or consent of the defendants, or either of them, was at no time made.

A decree entered by consent of the parties, as shown by the decree itself or by other evidence consistent with the record, cannot be appealed from, nor can error be assigned upon it. Krieger v. Krieger, 221 Ill. 479.

The decree is affirmed.

*Affirmed.*

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#### Commissioners of Highways of Eldorado Township, McDonough County, v. John N. Foster.

1. CHANCELLOR—*effect given to findings of fact.* Findings of fact by a chancellor are entitled to as much weight upon controverted questions of fact as is the verdict of a jury.

2. HIGHWAY COMMISSIONERS—*rights and obligations of, to undertake to drain public highway.* Where highway commissioners undertake to drain a public highway, they possess the same rights and are governed by the same rules as are adjoining landowners, who may undertake to drain their own lands, except where they proceed under the eminent domain laws of the state.

3. HIGHWAY COMMISSIONERS—*when injunction lies against.* Where highway commissioners attempt to divert water from its natural course and drain it upon the land of another, they will be enjoined at the instance of the owner of the land upon which the water is proposed to be turned.

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Com. of Highways of Eldorado v. Foster.

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Bill in equity. Error to the Circuit Court of McDonough county; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

NEECE & ELTING and CHARLES W. FLACK, for plaintiffs in error.

SHERMAN, TUNNICLIFF & GUMBART, for defendant in error.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a bill in equity by which the defendant in error seeks to enjoin the plaintiffs in error from removing the filling or dam by them placed in a ditch in a certain highway, from in any manner interfering with the defendant in error filling said ditch and from ever in the future digging or causing to be dug, any ditch or ditches in said highway. A decree was entered substantially in accordance with the prayer of the bill, to reverse which decree this writ of error is prosecuted.

Defendant in error, Foster, is the owner and in possession of the northeast quarter of section 10, in township 4, in the county of McDonough. One Russell is the owner of the northwest quarter of section 10, and one Deane of the southwest quarter of section 3, in said township. The southeast quarter of section 4, in said township, is known as the Mershon land. There is a public highway running east and west on the north side of the lands owned by Foster and Russell, and along the south side of the Deane and Mershon lands, and another public highway running north and south on the west side of the Russell land and between the Deane and Mershon lands.

There is evidence tending to show, and the chancellor found, that plaintiffs in error had, prior to the filing of the bill, caused a ditch to be dug on the south side and near the west end of said first described highway, through a raise or knoll, about two and a half

feet in height; that they also caused a culvert to be placed across the last described highway, immediately west of said described lands and near the intersection of the two highways, which ditch and culvert would interfere with and interrupt the running of surface water from the intersection of said highways in a southerly direction to and upon the land north and west thereof as was its natural course, and cause it to flow in an easterly direction through said ditch and along the said east and west highway and empty upon the land of defendant in error, at a place where it would not otherwise empty.

The chief issues here involved are of fact. While the evidence is somewhat conflicting, the chancellor has found the material averments of the bill to be true. His finding is entitled to as much weight on controverted questions of fact as the verdict of a jury. Such findings cannot be said to be manifestly against the weight of the evidence, and we are therefore not at liberty to disturb the same. *Haug v. Haug*, 193 Ill. 645. Moreover, we have carefully read the record in connection with the plat appearing therein and are of opinion that the findings of fact incorporated in the decree are well supported by the evidence.

The decree is therefore warranted and proper under the well-settled law applicable to such facts. Where commissioners of highways undertake to drain a public highway, they possess the same rights and are governed by the same rule as adjoining landowners, who may undertake to drain their own lands, except where they proceed under the eminent domain laws of the state. *Young v. Com. Highways*, 134 Ill. 569; *Barnard v. Com. Highways*, 172 Ill. 391; *Davis v. Com. of Highways*, 143 Ill. 9. While the manner of improving highways is left principally to the wise discretion of the commissioners of highways, and in the exercise of the duties imposed on them by law, they cannot be interfered with, unless they invade some private right of the citizen, in draining a pub-

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lic road they have no right to divert the water from its natural course, and drain it upon the land of another. If they attempt to do so they may be enjoined by a court of equity at the suit of the owner of the land upon which the water is proposed to be turned. *Young v. Com. of Highways, supra.*

The decree of the Circuit Court is affirmed.

*Affirmed.*

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**The Jones & Adams Company v. Consolidated Coal Company of St. Louis.**

**CONTRACT—*strike clause excusing performance construed. Held,*** that under a fair and reasonable construction of the contract in question in this case only such strikes excused performance as directly prevented such performance.

**Assumpsit.** Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. *Affirmed.* Opinion filed June 1, 1907.

RUNNELLS & BURRY and HAMILTON & CATRON, for appellant.

LAWRENCE & FOLSOM, FORMAN & WHITNEL and PATTON & PATTON, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

The pleadings and issues involved in this cause are sufficiently stated in the opinion of this court upon a former appeal, reported in 120 Ill. App. 139.

Upon remandment of the cause another trial was had resulting in a judgment in favor of the plaintiff for \$7,977.63, to reverse which the defendant prosecutes the present appeal.

A number of questions which were considered and determined upon such former appeal are again pre-

sented and argued. We adhere to the views there expressed upon the questions as to whether under the contract between the parties the cars upon which the coal was to be delivered were to be furnished by the vendor or vendee, the competency of evidence tending to show a practical contemporaneous construction by the parties of the contract in that respect, and whether or not the contract was to any extent illegal and void under the statute relating to options.

Upon the last trial substantially the same correspondence offered and admitted upon the former trial was again introduced in evidence. Notwithstanding the able and elaborate arguments of counsel, we are still of opinion that such evidence was not only competent, but was sufficient to justify the jury in finding that appellant by its conduct construed the contract as imposing upon it the duty to furnish the cars in question.

It is contended that no substantial damages were shown by competent evidence. It is not controverted that during the period of time covered by the contract, appellee demanded, and appellant failed to deliver 30,610 tons of coal more than was delivered by appellant. The witness, Hill, called by appellee, testified that during the term covered by the contract, the market price of coal at and in the vicinity of Springfield, the place of delivery, varied from \$1.75 per ton in October, 1902, to \$3.50 and \$3.75 in the following December and January, and that it then receded to \$1.50 in February and \$1 in March. No evidence to the contrary was adduced by appellant, but in support of the claim that these prices did not represent the true market value, evidence was introduced by appellant which tended to show that during the time in question an unlawful combination of coal operators and dealers, known as the Northern Illinois Soft Coal Association, and which controlled the output of coal in Northern Illinois, about one-fifth of the total product of the state, was engaged in regulating and raising the price of coal in

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Chicago and vicinity. That during the same time a large quantity of coal was accumulated by speculators, in an attempt to "corner" the market, which coal was stored upon cars in the terminal railroad yards in and around Chicago. That this tended to cause not only an unusually high and erratic market at Chicago, but also created a scarcity of cars.

It is insisted by appellant that in view of the foregoing evidence, it necessarily follows that the prices shown by the evidence were temporarily inflated, and based upon an unlawful market, and were therefore not properly to be considered in estimating the damages. Appellee contends that inasmuch as the parties to the alleged unlawful combination referred to, neither sold or shipped coal to the Springfield market, it could not have affected the prices there, and Sweet, one of its witnesses, testified that the scarcity of coal in the west was the cause of the higher prices and that the action of the combination in question did not affect the prices, even at Chicago. The question was one for the determination of the jury and we cannot say that their finding that the market prices of coal at Springfield during the term of the contract were those fixed by Hill and others of appellee's witnesses, was so clearly contrary to the evidence as to warrant our disturbing the same.

The contract between the parties contained the following clause: "It being understood and agreed that said first party (appellant) will not be required to furnish coal under its agreement during any portion of the time when prevented by strikes, unavoidable accidents or other causes beyond its control from handling the product of the mine from which the coal herein provided for is produced." The evidence tends to show that, beginning in the summer of the year 1902, a strike occurred in the anthracite coal fields of Pennsylvania and elsewhere which lasted until about November of that year. That in consequence many cars ordinarily used in the west were caused to go east

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loaded with coal for consumption in that territory, causing a scarcity of cars in Illinois from September until March. Appellant requested the court to instruct the jury that if they believed from the evidence that the defendant was prevented from delivering to the plaintiff any coal called for by the contract, by strikes, unavoidable accidents or other causes beyond the defendant's control, then it could not be held liable for a failure to deliver such coal; and further that such strikes might include not only those of the defendant's own employes but any other strike influencing the defendant's ability to furnish such coal. The court refused to so instruct the jury, but did instruct them that the so-called "anthracite strike" could not be considered by them as a strike within the exception in the contract which exempted defendant from furnishing coal when prevented by strikes. It is insisted that this was error. We are of opinion that the ruling of the court upon these instructions was proper. Under a fair and reasonable construction of the contract in this regard only such strikes were intended to excuse performance as directly prevented appellant from handling the product of its mines. While the shortage of cars may have, to some extent, been due to the "anthracite strike," such strike was, as shown by the evidence, at the most, but one of several contributing causes. It cannot be said to have been the primary or chief cause, as was contemplated by the contract. Moreover, with the limitation referred to, the jury were fully instructed that any strike, unavoidable accident or other cause that prevented the defendant from handling the product of its mines during any period of time, would operate to relieve it from performance of the contract during such time; and further that in the event of any inability to obtain cars arising from causes beyond the control of the defendant, the plaintiff could not recover on account of any coal which it was thus prevented from delivering. The issue of fact was thus

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directly and fairly presented to the jury and they were properly instructed as to the law applicable to the facts as they found them. The evidence fails to show that at any time, for any reason, appellant was wholly prevented from handling the product of its mines. On the contrary it appears that it received, filled and shipped cars of coal almost daily during the entire period covered by the contract.

The evidence also shows that during the time appellant received many more cars than would have been sufficient to supply appellee with the coal called for by the contract. It is claimed by appellant, and there is evidence tending to show, that some of these cars were furnished by the railroads or other customers of appellant, with binding conditions as to their use, and were therefore not available for use in filling appellee's contract. It does not definitely appear, however, how many of the cars in question were, for the reasons stated, not available for general commercial purposes. The burden rested upon appellant, to show by the greater weight of the evidence, that it was prevented by the causes enumerated in the contract, from handling in whole or part, the product of its mine. It was difficult for the jury to determine from the evidence to what extent, if any, such causes existed. The question was peculiarly for their determination, and in this state of the proof we are not inclined to hold that the finding that appellant was not to any extent so prevented, was clearly and manifestly against the evidence.

The given instructions state the law applicable with substantial accuracy, and those refused were properly so.

The judgment of the Circuit Court is affirmed.

*Affirmed.*

**People's Bank, Trustee, et al. v. American National Bank.**

**CORPORATION—when individual debt of owners of, will be enforced against.** Where a corporate business is owned in the entirety by persons who have borrowed money for the express purpose of purchasing such corporate business and who have in fact purchased such corporate business with the money so borrowed, the debt so created will be enforced against the corporation.

Bill in chancery. Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**LILLARD & WILLIAMS, E. E. DONNELLY and H. D. SPENCER, for appellants.**

**JOHN E. POLLOCK, for appellee.**

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a bill in chancery in the nature of a bill of interpleader, filed by the People's Bank of Bloomington, Illinois, against the American National Bank of Findlay, Ohio, and others. The bill avers and the evidence adduced on the hearing discloses the following facts: On March 30, 1906, the Schneider Shoe Company, a corporation organized and doing business under the laws of Illinois, and engaged in the retail boot and shoe business in Bloomington, Illinois, being insolvent, prepared a statement of its financial condition, showing the approximate value of its assets and its approximate liabilities, so far as it is claimed to know them, copies of which were sent to each of its creditors together with an offer to turn its assets over to the People's Bank, as trustee, to sell and collect the same and distribute the proceeds thereof among the creditors of said Schneider Shoe Company. All of the creditors in question accepted the proposition. The

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People's Bank proceeded to execute the trust and after having done so, had on hand a total net sum sufficient to pay about 78 per cent. upon the claims of the then known creditors. At this time appellee, The American National Bank of Findlay, Ohio, presented to the trustee a note for about \$1,050 signed by the Schneider Shoe Company and George W. Hall and Lottie P. Hall, and demanded that the same be treated as a part of the indebtedness of the shoe company and be paid *pro rata* out of the fund in the hands of the trustee, threatening in case of a refusal, to institute legal proceedings. Certain of the creditors of the shoe company, upon learning of the claim of appellee, protested against the payment of any part of the fund in question, and threatened in the event of such payment being made, to bring suit against the trustee for the amount so paid, upon the ground that the note in question was that of George W. Hall and Lottie P. Hall, only, and not that of the shoe company, and that the name of the said shoe company was signed to said note without its authority. Appellee and a number of the protesting creditors entered their appearance and stipulated to waive further pleadings and an interlocutory decree of interpleader, and to submit the issue as to whether appellee was entitled to a distributive share of the fund, upon the evidence.

The chancellor, upon hearing, decreed that the complainant pay the American National Bank the sum of \$795, its *pro rata* share of the fund. From such decree the complainant and objecting creditors aforesaid, prosecute this appeal.

The evidence shows that in March, 1900, one Wakefield and others, for the purpose of carrying on the retail boot and shoe business in the city of Bloomington, Illinois, organized a corporation called Schneider Shoe Company with a capital stock of \$15,000. In April, 1904, George W. Hall and Lottie P. Hall, his wife, bought the entire capital stock of said corporation for the sum of \$16,000. The capital stock was

reduced to \$11,000 and George W. Hall, who was elected the president of the company, thereafter managed the business until the corporation became insolvent and executed an assignment as averred in the bill.

Prior to the purchase of said capital stock, Hall, who was then residing at Findlay, Ohio, applied to the cashier of appellee at Findlay for a loan of \$1,500, which he stated was to be invested in the shoe business at Bloomington, Illinois. He and his wife signed a note payable to appellee for the sum of \$1,500, the proceeds of which were paid to Hall by a draft, which he used in part payment for the capital stock of the Schneider Shoe Company. The original note to the bank was dated March 26, 1904, and was renewed in September, 1904, March, 1905, and September, 1905, all of said renewal notes being signed by Hall and his wife. At the maturity of the last note on November 14, 1905, appellee refused to renew the same, and thereafter Hall made monthly payments thereon until the amount due was but about a thousand dollars. On March 30, 1906, appellee received the statement and proposition hereinbefore referred to, requesting the various creditors of the Schneider Shoe Company to consent to the appointment of the People's Bank as trustee. Oeff, the cashier of appellee, at once visited Bloomington, and at his request, Hall signed the name of the Schneider Shoe Company to the note. Neither Oeff nor the other officers of appellee had prior to that time any knowledge of the existence of the corporation.

There is some conflict in the evidence as to whether or not Hall purchased the capital stock of the corporation, or merely the stock of merchandise owned by it. In support of the former contention, a written contract was introduced in evidence, between Wakefield and others, the former owners of the capital stock, and Hall, which recites in substance that Hall had purchased and was to pay for the "stock" of the Schneider

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Shoe Company the sum of \$15,000; that the sum of \$9,000 was to be paid therefor upon invoice; and that the "shares of stock" purchased were to be assigned by the vendors in blank and delivered to and held by the People's Bank until the balance of the purchase price was paid in the manner and at the time therein provided. Hall testified that notwithstanding the recitals of such contract, what he bought was the stock of goods. The evidence tends to show further that in his dealings with some of the creditors Hall did business as the Schneider Shoe Company and with others under the name of George W. Hall, and that he reported to one commercial agency under the corporate name, and to another under his individual name.

We do not consider the question as material or controlling. For the purpose of this proceeding, which is purely equitable, we regard the certificates of stock as being but evidence of ownership of the merchandise; and the assignment of the same, in blank, as but a convenient method adopted by the parties for the transfer of the title to such merchandise, and the preservation of a lien thereon for the security of the vendors. In other words, the transfer of the certificates was formal only, the real transaction being the purchase of the merchandise. The trustee took and has no greater interest or better title to the merchandise or its proceeds than had Hall. Schwartz v. Messinger, 167 Ill. 474; Davis v. Dock Co., 129 Ill. 180. The evidence satisfactorily establishes that appellee extended credit to Hall solely upon his representation that he intended using the money loaned to him in part purchase of the stock of goods, and that it was so used. Inasmuch as Hall and his wife owned and controlled all of the capital stock of the corporation, he was in fact but carrying on the business in the name of the corporation. The doctrine of *ultra vires* invoked by appellant is inapplicable. The facts in Wheeler v. Home Savings Bank, 188 Ill. 34, cited by appellants, differ from those here involved in that

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there the insolvent corporation received no benefit whatever from the debt contracted by its president and was therefore not responsible for the same either in law or equity.

Inasmuch as the money represented by the note held by appellee was used in the business conducted by Hall, equity demands that it be paid *pro rata* from the proceeds of such business without regard to the name or style under which the same was conducted or the particular form of the evidence of the indebtedness.

The decree of the Circuit Court is accordingly affirmed.

*Affirmed.*

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#### City of Macomb v. County of McDonough.

1. **PAUPERS**—when county liable to city for expenditures in furnishing medical aid, etc. Where a county after notice of the necessity therefor fails to care for poor persons, as provided by section 24 of the Pauper Act, and a city does so, such city may recover from the county the amount expended by it for that purpose, if reasonable, and notice to any one of the members of the county board is sufficient.

2. **INSTRUCTION**—when giving of, containing abstract proposition of law, erroneous. An instruction containing an abstract proposition of law is ground for reversal where its tendency would be to mislead the jury.

**Assumpsit.** Error to the Circuit Court of McDonough county: the Hon. J. A. GRAY, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

**HARRY M. TABLEB** and **PHILIP E. ELTING**, for plaintiff in error.

**WILLIAM H. NEECE**, for defendant in error.

**MR. JUSTICE PUTERBAUGH** delivered the opinion of the court.

This is an action in *assumpsit* by appellant against

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appellee for the recovery of money alleged to have been expended by said city for necessary board, nursing and medical aid rendered to poor persons afflicted with small-pox. A trial by jury resulted in a verdict in favor of the defendant, to reverse which the plaintiff appeals. The declaration alleges that on August 15, 1901, there were in the city of Macomb, divers persons, residents of the defendant county, who were afflicted with small-pox, and were poor persons, not having money or property with which to pay their board, nursing and medical aid and who were not properly provided for, of all of which the defendant through its officers then and there had notice; that although it was its duty to provide said poor persons with board, nursing and medical aid, the defendant neglected and refused so to do; that the plaintiff, by its board of health, then and there deeming it necessary that immediate steps be taken to protect the lives of said poor persons, and to prevent the spread of said disease, procured and furnished the board, nursing and medical aid necessary to be rendered to such poor persons and paid out therefor, for the use of the defendant, the sum of \$2,000; that afterward the plaintiff presented a statement in writing of its reasonable charges in that behalf to the county board of the defendant county, by reason whereof the defendant became liable to and promised to pay the same to the plaintiff, etc. To such declaration the plea of general issue was interposed. The evidence tends to show that on July 5, 1901, the following persons residing in Macomb were afflicted with small-pox, viz.: seven members of the Leach family, who were confined in quarantine; eight members of the Rinehart and Everman families, all in quarantine at the Breeden house; and eight young men and women, who were detained at the pest house provided by the city. The evidence further tends to show that upon learning of the prevalence of the disease, the board of health of the city of Macomb held a meeting, and that afterward, Smithers,

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the clerk of the board, notified supervisor Barley, the *ex-officio* overseer of the poor for the city of Macomb, that the board of health had concluded to take charge of the small-pox cases themselves; that they had looked up the law and found that the board had the same rights that the supervisors had, and that Barley responded "All right, I don't want to look after it anyway. I am glad to get out of it."

Appellant predicates its right of recovery upon section 24 of the statute entitled "Paupers" then in force, which reads as follows: "When any non-resident or any person not coming within the definition of a pauper of any county, or town, shall fall sick, not having money or property to pay his board, nursing and medical aid, the overseers of the poor of the town or precinct in which he may be, shall give, or cause to be given, to him such assistance as they may deem necessary and proper, or cause him to be conveyed to his home, subject to such rules and regulations as the county board may prescribe and if he shall die, cause him to be decently buried." Rev. Stat. 1901, page 1315.

It is well settled that where a county, after notice of the necessity therefor, fails to care for poor persons as provided by the foregoing statute, and a city does so, such city may recover from the county the amount expended by it for that purpose, if reasonable, and notice to any one of the members of the board is sufficient. *City of Chester v. County of Randolph*, 112 App. 513; *County of Winnebago v. City of Rockford*, 61 App. 656; *County of Perry v. City of DuQuoin*, 99 Ill. 494.

We have read the abstract of the evidence adduced upon the trial and are satisfied therefrom that the persons to whom assistance was rendered by appellant, while not paupers, were "poor persons" within the intendment of the statute quoted. Furthermore, we think that where an epidemic of contagious disease threatens a community, it is not essential that the authorities, before taking action to meet the emergency,

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make any other or further investigation as to the financial status of those already afflicted than is reasonable and possible under the circumstances. The statute should receive a liberal, rather than strict construction. The mere fact that it may be subsequently developed that one or more of the persons cared for had money or property with which to pay his board, nursing or medical aid, in whole or in part, should not operate to prevent reimbursement by the county in cases where the city authorities have exercised the degree of diligence shown in the present case. The evidence further tends to show that the assistance rendered was not only necessary, but apparently imperative, and further that the expenditures were reasonable in view of all the circumstances.

It is not controverted by appellee that the county authorities, through Barley, did have full notice of the situation and the attendant perils, but it is strenuously insisted that the city officials, because of their failure to request the overseer of the poor to take charge of the matter, and the announcement that they had decided to assume such duty, relieved the county of the same; that there is no proof in the record that the county board at any time neglected or refused to perform their entire duty in the matter; that the city, having through ignorance of the law, exceeded their authority and assumed a burden not imposed upon them, should bear the expense thereof. Such contention is without force. The overseer of the poor must have known that under the law, it was the duty of the county to render such assistance as was necessary to those coming within the statute. If after having had notice of the emergency existing, and that the city was about to take charge of the patients, the county board desired to exercise the right to determine who should or should not receive aid and to regulate and control the expenses to be incurred in rendering the same, it should have ignored the city authorities and insisted upon its right to perform the duty imposed upon it by the statute.

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Having, by acquiescence, waived its right and power in the premises, and permitted the city to assume the duty and responsibility, it cannot now complain. We are therefore of opinion that the unwarranted assumption of jurisdiction and control by the city did not operate to relieve the county of its liability for the necessary and reasonable expenses incurred.

The third instruction given at the instance of appellee, was abstract in form and defined the word "pauper" as used in the statute. The instruction was prejudicial, as tending to lead the jury to believe that in order to warrant a recovery, it was essential that those cared for must have fallen within the definition therein given. There was no claim that such persons were paupers and the question was not involved. The judgment is reversed and the cause remanded.

*Reversed and remanded.*

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#### Springfield Consolidated Railway Company v. Marguerite Johnson.

1. **PASSENGER AND CARRIER—when instructions as to duty of latter to former, not erroneous.** An instruction which tells the jury, in effect, that if the plaintiff was injured in the manner and under the circumstances charged in her declaration, it devolved upon the defendant "to show that said injury was occasioned without its fault or that of its servants;" and another which tells the jury that it was incumbent upon the defendant "to show that said injuries were occasioned by no lack or want of the highest degree of care and caution on its part, consistent with the practical operation of its road, for the safety and security of passengers or those about to become such," are not erroneous.

2. **INSTRUCTIONS—must be predicated upon the evidence.** Instructions not predicated upon any evidence in the case are properly refused.

3. **VERDICT—when not excessive.** A verdict of \$1,000 in an action for personal injuries is not excessive where it appears that the injury in question consisted of a fracture of the pterion, which is a point about an inch and a half back of the eye, and that from such injury headaches followed which were likely permanently to continue.

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Action in case for personal injuries. Appeal from the Circuit Court of Sangamon county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

WILSON, WARREN & CHILD, for appellant.

T. J. CONDON and ALBERT SALZENSTEIN, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

Appellee recovered a judgment for the sum of \$1,000 against appellant, to reverse which this appeal is prosecuted.

The first count of the declaration alleges that appellee was about to become a passenger on one of the cars of appellant standing on South Grand avenue near the south entrance to Washington Park in Springfield; that while she was entering the car with due care and caution for her own safety, the brake on the car nearest such entrance, through the carelessness of appellant's servants in setting or placing such brake, swung loose and struck the appellee in the forehead over the right eye, fracturing the skull and otherwise bruising her. The second count alleges that while appellee was entering the car, the brake on the car nearest such entrance, through the negligence and want of proper care of the appellant, suddenly swung loose and struck appellee in the forehead over the right eye, fracturing her skull and otherwise bruising her.

The following are stated by appellant in its brief and argument filed in this court to be the facts: "On the day of the accident, as one of appellant's cars reached the terminus of its line, appellee and Ethel Wisbee approached the car for the purpose of becoming passengers. When the car reached the end of the line, the motorman who was then on the west end of it, removed the controller and started to walk through the

car to the east end for the purpose of putting his controller on that end and starting the car on the return trip.

When the car stopped, the conductor, who was on the east end, got off, pulled the arm from the trolley wire and started to walk around to place the arm on the wire at the west end of the car. When he got about half way around he heard some one cry out, 'Oh!' whereupon he placed the trolley arm on the trolley wire at the west end of the car, boarded the car and found appellee and Ethel Wisbee standing up in the car, one of whom said that she had been hurt. As the motorman was passing through the car from the west end, when near the east end and before he had reached the east platform, he heard the same exclamation, of 'Oh!' Before leaving the west end of the car the motorman had released the brake on that end. The brake was of the goose-neck pattern and was located near the rear dashboard in the right-hand corner of the platform. Appellee testified that while she was stepping from the step of the car to the platform, with one foot on the step and the other on the platform, the brake handle suddenly flew around and struck her in the forehead. Ethel Wisbee testified that she got upon the car immediately in front of appellee and that before going from the car platform into the body of the car she turned around just in time to see the brake strike appellee in the forehead." The motorman testified that he thought he had used the same car all that day and that there was nothing wrong with it.

By one of the instructions given at the request of appellee, the jury was instructed, in effect, that if the plaintiff was injured by the means, in the manner and under the circumstances charged in her declaration, it devolved upon the defendant "to show that said injury was occasioned without its fault or that of its servants;" and by another, "to show that said injuries were occasioned by no lack or want of the highest degree of care and caution on its part, consistent

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with the practical operation of its road, for the safety and security of passengers or those about to become such."

It is urged that such instructions were erroneous for the reason that by them the jury were given to understand, not merely that the burden was upon the appellant to show that it was not guilty of negligence, but that unless the appellant produced evidence which explained the mysterious and unexpected action of the brake, so that the jury could see from such explanation that the appellant was not guilty of negligence, then the appellee was entitled to recover.

We do not regard the instructions as subject to the criticism urged. It is conceded by counsel that under the facts and circumstances shown by the evidence, the doctrine of *res ipsa loquitur* is applicable. In such case the mere occurrence of the accident affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care, and was sufficient *prima facie* proof of negligence to impose upon the defendant the *onus* of rebutting it. R. Co. v. Barker, 209 Ill. 321. By the instructions in question no greater burden was imposed upon the defendant than is imposed by law.

The court refused to instruct the jury, at the request of appellant, that the defendant was "not bound to guard against every possible danger," and that if the injury "was caused by a hidden defect in the mechanism of the brake not reasonably to be anticipated, and about which defendant had no knowledge," or "by a dangerous defect in the mechanism of the brake unknown to the defendant, and which was so extraordinary or unusual as not to be reasonably anticipated," then the plaintiff could not recover. These instructions were properly refused, for the reason, among others, that there was no evidence tending to show that the mechanism of the brake was in any way defective. On the contrary, the evidence adduced by appellant showed that the brake and its appliances

were in good condition and working order, and that no defect, either patent or latent, existed.

It is further contended that no negligence was shown on the part of appellant and that the verdict is therefore contrary to the evidence. Such contention is unwarranted. Under the rule of *res ipsa loquitur* it was unnecessary for the plaintiff to prove the particular negligence which caused the brake to swing loose. Appellee and Miss Wisbee each testified that they neither handled nor touched the brake, and the jury doubtless believed them. The motorman and the conductor denied that either of them handled or touched it. In this state of the proof, the only remaining theory tenable is that the brake was either improperly set or that it or its appliances were defective or in bad order. The claim by appellant that the occurrence was one of that class which are designated as pure accidents is absurd. Whether the evidence offered by appellant rebutted the *prima facie* case established by the doctrine of *res ipsa loquitur* was a question for the jury (Traction Co. v. Newmiller, 215 Ill. 383), and we think their findings were warranted by the evidence.

It is finally contended that the damages awarded are excessive. We do not think so. The evidence shows that the injury consisted of a fracture of the *pterion*, a point about an inch and a half back of the eye; that a week elapsed before such fracture was reunited, that during such period appellee was compelled to remain at a hospital at an expense of \$8.40 and that she suffered intense pain for a time. She testified that prior to the injury she had never been afflicted with "headaches," but that since she had suffered severely from them and frequently. In this she was corroborated by the testimony of Dr. Otis, her family physician, who further stated that the injury had resulted in a condition of inflammation surrounding the nerve which would probably cause frequent "headaches," which condition would likely be permanent. In actions in tort it is the peculiar province of the jury to fix the

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damages. 1 Sutherland on Damages, 810. We are therefore loth to substitute our judgment for that of a jury, where the sum awarded is not clearly excessive.

The judgment of the Circuit Court is affirmed.

*Affirmed.*

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**Levi W. Sholty et al., Commissioners of Highways, v.  
Daniel B. Stewart.**

1. **ROAD**—*jurisdiction of commissioners to open, of less than sixty feet in width.* A petition for a road of less than sixty feet in width must be signed by a majority of the landowners residing along the line of the proposed road, and in the absence of such a petition the commissioners are without jurisdiction to act.

2. **INJUNCTION**—*when lies to restrain opening of road.* Injunction lies at the instance of the owner of land sought to be taken to restrain highway commissioners from undertaking to open a road where the petition therefor does not confer jurisdiction.

Bill for injunction. Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

EDWARD PEIRCE, for appellants.

KERRICK & BRACKEN and MILES K. YOUNG, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a bill by appellee, the owner of the land sought to be taken, against appellants, as commissioners of highways, by which it is sought perpetually to enjoin them from opening or taking further steps to open a certain public road laid out and established by order of said commissioners, under the statute relating to the laying out and opening of public roads, in counties under township organization. Upon a hearing upon the bill, together with certain plats accompanying

the same, and the affirmation of the complainant, the chancellor held that appellants were without jurisdiction to lay out the road less than sixty feet in width, and granted a temporary injunction in accordance with the prayer of the bill. To reverse such interlocutory order this appeal is prosecuted.

The bill sets out a part of the proceedings before the commissioners which disclose that the road as petitioned for, and attempted to be laid out and established, was but forty feet in width and less than two miles in length. It is then averred that the commissioners were without jurisdiction to lay out the road under sixty feet in width unless a lesser width was petitioned for by a majority of the landowners living along the line of the proposed road; that there were no landowners living along such road and that in consequence no such petition was presented, and the commissioners were therefore without jurisdiction in the premises and their action void. Other grounds for the relief sought were averred in the bill which it will be unnecessary to consider. It is admitted that the foregoing averments of the bill are true, but it is contended by appellants that their action was warranted by section 30 of the Act of June 23, 1883, as amended by the Act of June 7, 1897, under which the road in question was laid out and established, which reads as follows:

"All public roads established under this Act shall be of the width of sixty (60) feet: Provided, that on petition for a new road, that if a majority of the landowners living along the line of said road, sign a petition for a less width than sixty (60) feet, then the highway commissioners may, when the interests of the public permit, authorize and lay out said road of a width not less than forty (40) feet; and roads called public and private may be of the width in this Act provided." Rev. Stat. 1905, 1728.

They insist that this section authorizes them to lay out a public road under sixty, and not less than forty feet in width: first, when a new road of such less

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width was petitioned for, as in this case; and second, when a greater width than forty feet was petitioned for and a majority of the owners of the land to be taken petitioned for such less width.

They also contend that the proviso contained in section 65 of the Act of April 11, 1873, as amended by the Act of March 26, 1874, has never been repealed; and that by it, also, they were authorized to grant the prayer of the petition and establish the road in question of the width of forty feet, because that width was prayed for in the petition and the road was under two miles in length. The section in question reads as follows:

“All public highways laid out by order of the commissioners of highways, or supervisors on appeal, shall be not less than fifty (50) feet wide nor more than sixty (60) feet wide: Provided, the commissioners may lay out roads not less than forty (40) feet wide nor more than sixty (60) feet wide, when so prayed for by the petitioners if such road does not exceed two miles in length.” Laws of 1873-4, page 136.

We are unable to give to section 30, *supra*, the meaning placed upon it by counsel for appellants, which he attempts to support and justify by elaborate, intricate and somewhat ingenious argument and reasoning. The language used seems to be so clear and unequivocal as not to require judicial construction. The plain and natural import of the words employed is that a petition for a road of less than sixty feet in width must be signed by a majority of the landowners residing along the line of the proposed road, and that in the absence of such petition the commissioners are without jurisdiction to act. Any other construction would seem to be wholly unwarranted.

We are further of opinion that section 65 of the Act of 1873 as amended, above quoted, is no longer in force, and therefore cannot be properly read into or considered as modifying or restricting the terms of

the existing statute upon the question. An examination of the Acts of 1873, 1879 and 1883 discloses that each of them fully covered the subject of roads and bridges and was obviously intended to be a complete revision of the law relating thereto. The adoption of each successive act thereby operated to repeal all former legislation upon the subjects embraced therein.

The commissioners clearly had no jurisdiction to establish the road here in question, and the order restraining them from so doing was properly entered.

*Affirmed.*

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**George A. Newman, for use of Henry E. Jolly, v. Daniel A. Sevier.**

1. **WARRANTY DEED—what covenants of, run with land.** The covenants in a warranty deed against encumbrances and for peaceable possession are perpetual and run with the land.

2. **WARRANTY DEED—what covenants do not run with the land.** The covenant of seizin contained in a warranty deed does not run with the land. It is a covenant *in praesentia* and the right of action for the breach is personal, and not assignable so as to enable a subsequent grantee of the covenantee to sue in his own name, but suit for such breach may be brought in the name of the covenantee for the use of a subsequent grantee.

Action in covenant. Appeal from the Circuit Court of Morgan county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

**LAYMAN & MORRISSEY, for appellant.**

**GEORGE L. MERRILL and WILLIAM N. HAIRGROVE, for appellee.**

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in covenant by George A. Newman, for the use of Henry E. Jolly, appellant, against appellee. The court sustained a demurrer to an amended

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declaration which consisted of two counts. The plaintiff elected to abide by the declaration and judgment was entered in bar of the action. The first count of the amended declaration alleges in substance, that on November 28, 1899, by deed of that date, for the consideration of \$1,000 the defendant conveyed and warranted to the nominal plaintiff, Newman, his heirs and assigns, in fee simple, certain premises, describing them, to have and to hold to the said Newman, his heirs and assigns forever, and covenanted with said Newman, his heirs and assigns, that he would warrant and defend the said premises to the said Newman, his heirs and assigns, against all lawful claims whatsoever; that on December 30, 1903, Newman, for the consideration of \$1,400 conveyed and warranted to Henry E. Jolly, for whose use the suit was brought, the same real estate, to have and to hold to the said Jolly, his heirs and assigns forever in fee simple; that the defendant was not, at the time of the making and delivery of the deed to Newman as aforesaid, lawfully seized of an indefeasible estate in fee simple to said premises, nor had he then good right and lawful power to convey the same, but at the time another person had paramount title to the premises: that the fee simple title was not fixed in the said Newman by virtue of said conveyance and that the defendant had not kept his covenant of warranty in fee simple, and had broken the same, to the damage of the said Jolly of \$2,000. Said count further alleges that on November 1, 1903, the said Jolly tendered to the defendant a re-conveyance of said premises which would place the title thereto in him in the same condition as it was at the time of the conveyance by him to Newman as aforesaid, and demanded of him the payment of the purchase price of said premises, together with legal interest thereon.

The second count alleges that on November 28, 1899, the defendant executed and delivered to George A. Newman a warranty deed in statutory form and which

is set out *haec verba*, whereby he conveyed and warranted to Newman for the consideration of \$1,000 the same premises described in the original count; that on December 30, 1903, the said Newman executed and delivered to Jolly, the party for whose use the suit was brought, a warranty deed, which is also in statutory form and set out *haec verba*, conveying and warranting to Jolly the premises in question; that at the time of the execution of such former deed the defendant was not seized in fee simple of said premises, nor had he since been seized of the same; but that at the time of such conveyance had only the title to a life estate in the same for and during the lives of one Felix A. Berryman and one Joanna Turner; that the defendant had not kept his covenant in said deed, but had broken the same, to the damage of the plaintiff, for the use of said Jolly, etc. It then avers an offer by Jolly to re-convey the premises and a demand upon the defendant of the purchase price, and the refusal of the defendant to accept or pay, etc., as in the first count.

Appellant contends that the covenant of warranty by the defendant to Newman runs with the land, and passed by the conveyance of Newman to the plaintiff; that the cause of action for breach of covenant is therefore vested in the plaintiff, and that the suit is properly brought in the name of Newman for the use of Jolly; that the tender of the re-conveyance by Jolly to the defendant and demand for the purchase-money, vested the right of action in Newman for the use of Jolly; and that the plaintiff did not have to wait for an eviction before bringing suit for a breach of the warranty. The contention of appellee is that if any covenant has been broken it is the covenant of seizin which does not run with the land; that if broken at all it was at the time of the conveyance by appellee to Newman, and Jolly should bring his action against Newman, his immediate grantor; that the covenant of warranty which does run with the land has

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not been broken and appellant can have no action on that covenant; and, further, that if any cause of action accrued to Jolly, or for his use, it must have accrued by virtue of the deed from Newman to Jolly, and that if the covenant of seizin was broken at the delivery of the deed from Sevier to Newman the right of recovery for such breach thereafter became a chose in action which could not be assigned. We are of opinion that the second count states a cause of action which can be properly asserted in the name of Newman for the use of Jolly. The deed from Siever to Newman is averred to be in the form prescribed by section 9 of the statute entitled "Conveyances," which section further provides that every deed substantially in such form, "when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs or assigns, with covenants on the part of the grantor, (1) that at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple in and to the premises therein described, and has good right and full power to convey the same; (2) that the same were then free from all encumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same." Rev. Stat. 1905, 465.

It is not averred in either count that the premises were at the time of the conveyance by Sevier to Newman, or had since become subject to any encumbrance, nor that either Newman or Jolly had ever been disturbed in the quiet and peaceable possession of the same, nor that the title thereto had ever been attacked in any manner by any person or persons claiming the same. No breach of either of the latter two covenants, which are perpetual and run with the land into the hands of subsequent grantees, and are broken only by an eviction or something equivalent thereto (Brady v. Spruck, 27 Ill. 478; Scott v. Kirkendall, 88

Ill. 465; Barry v. Guild, 28 App. 39), is averred. The only breach that arose from the fact that Sevier had but a life estate in the premises at the time he conveyed, was that of the covenant first prescribed by the statute which is one of seizin and of good right to convey. It is well settled in this state that such covenants are *in praesenti*; that if the covenantor at the time has no title, it is broken when the conveyance is made, and a right of action at once accrues to the covenantee, and further that such right is but a mere chose in action which is personal and not assignable so as to enable a subsequent grantee of the covenantee to sue in his own name. King v. Gilson, 32 Ill. 348; Brady v. Spruck, 27 Ill. 478; Baker v. Hunt, 40 Ill. 264; Jones v. Warner, 81 Ill. 343; Tone v. Wilson, 81 Ill. 529.

The contention of counsel for appellant that the covenants of the deed from appellee to Newman ran with the land and passed to Jolly by the conveyance to him from Newman is therefore well-founded in so far as the covenants against encumbrances and assurance of quiet enjoyment are concerned, but not so as applied to the covenant of seizin. The covenant for seizin is defined to be an assurance to the grantee that the grantor has the very estate, both in quantity and quality, which he professes to convey. Howell v. Richards, 11 East, 641. The covenant of warranty is in legal effect the same as a covenant for quiet enjoyment. Athens v. Nale, 25 Ill. 198. The true meaning of the covenant is said to be that the grantee, his heirs and assigns, shall not be deprived of possession by force of a paramount title. Rindskopf v. Trust Co., 58 Barb. 36.

In distinguishing between the various classes of covenants, Washburn in his treatise on the law of Real Property (Vol. 3, 4th Ed., 448), says:

“A marked difference between covenants of seizin, and the right to convey, and against encumbrances, and those of warranty, quiet enjoyment, and

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further assurance is, that the former are all in the present tense, relating to something being or existing at the time when the covenant is made; while the others relate to something future, and are to guard against the consequences of some future act, or for the performance of some future act which the condition of the title to the estate may require. Two important consequences grow out of this form of the first named covenants, namely: that, if they are ever broken, the breach is simultaneous with the making of the covenant. If the grantor was then seized, he had made good his covenant, and he had a right to convey; if he was not seized, he had violated his covenant as soon as made, and had no right, at common law, to convey the estate, and nothing passed by the deed. So with encumbrances; these did or did not exist when the deed was made, and if they did, the covenant that they did not was then broken. A further consequence was, that a cause of action was at once created in favor of the covenantee to recover his damages; and this being what in law is called a chose in action, the law, as a general proposition, does not allow of its being transferred to another to be taken advantage of by him in his own name. So that a covenant of seizin is not one which can be transferred from one grantee to another grantee of the land in relation to which it is made; in other words, it is not a covenant that runs with the estate. This may be stated as the American doctrine, though differing in some respects from that of the modern English decisions, and, to a certain extent, those of several of the states."

It follows that while Newman had a right of action against appellee under the covenant of seizin contained in his deed, no such right accrued to Jolly, who was but a remote grantee.

An examination of the cases cited by counsel for appellant discloses nothing therein inconsistent with such conclusion.

We perceive no reason, however, why Newman's right of recovery may not be asserted in his name,

for the use of Jolly. Richard v. Bent, 59 Ill. 38. The equitable owner of a chose in action is entitled by virtue of such ownership to maintain a suit at law in the name of the party having the legal right, for his use. Carlyle v. Carlyle, 140 Ill. 445; Knight v. R. Co., 141 Ill. 110; Shoe Co. v. Lewis, 191 Ill. 155.

For the purposes of this demurrer the action at bar may be properly treated as that of Newman whose right to recover for the breach assigned is unquestioned. It will be observed that in the first count the damages are alleged to have accrued to Jolly, the usee plaintiff, and not to Newman, the nominal plaintiff. In the light of the foregoing views the count is thus defective and the demurrer thereto was properly sustained.

The judgment of the Circuit Court is reversed and the cause remanded with directions to overrule the demurrer to the second count of the declaration.

*Reversed and remanded with directions.*

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**Edward R. Moffett v. The People, for use of County of Macon.**

1. **MISTAKE OF LAW—when money not paid under.** Money paid by a county to an officer thereof pursuant to an increase, which increase was void in law, is not deemed to have been paid under a mistake of law and may be recovered by such county.

2. **COUNTY BOARD—when without jurisdiction to increase salary of officer.** A county board is without jurisdiction to increase the salary of an officer after the term of office of such officer has commenced.

Action of debt. Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the May term, 1906. Affirmed. Opinion filed June 1, 1907.

BOGESS & MOFFETT, for appellant.

W. E. REDMON, for appellee.

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MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action of debt brought in the name of the People of the State of Illinois, for the use of the County of Macon, against Edward R. Moffett, upon his bond as county treasurer of said Macon county. The sureties upon said bond were made parties defendant but were not served with process. The cause was tried by the court, without a jury, and resulted in a finding and judgment that the plaintiff recover from the defendant, Moffett, its debt of \$135,000 and its damages of \$500; such debt to be discharged upon payment of the damages and costs. This appeal is prosecuted by the defendant, Moffett. The facts involved, as disclosed by an agreed state of facts, are substantially as follows:

At the November election in 1902, the appellant, Moffett, was elected county treasurer in and for the county of Macon. At their September meeting next preceding the election, the board of supervisors of said county had fixed the salary of the county treasurer, for the term beginning on the first Monday of December, 1902, at \$1,600 per annum, and necessary clerk hire. Appellant, upon his election, duly qualified and gave bond as county treasurer, in the sum of \$135,000, conditioned according to law, with the other defendants as sureties, and entered upon the performance of the duties of such office. During the year 1903, he also acted as supervisor of assessments in and for said county, as required by law, and afterward presented a bill to the board for the sum of \$500 which he claimed to be due him for salary as supervisor of assessments for the year 1903. The bill was referred by the board to the committee on fees and salaries, who reported that the same should be allowed and recommended its payment. The report was adopted by the board, and pursuant thereto the county clerk executed and delivered to appellant a county order for \$500. Appellant thereupon paid said sum to him-

self out of the funds of the county held by him as county treasurer, and the action at bar was brought to recover the same. The declaration, in substance, alleges the election of appellant as county treasurer; the fixing of his salary; his qualification as county treasurer; the execution, delivery and approval of his bond as such treasurer, together with the conditions of the same. It then alleges that it was the duty of appellant as such county treasurer to perform the duties of supervisor of assessments without any compensation or salary in addition to his salary of \$1,600 per annum as county treasurer; that he did not safely keep the revenues and public money of said county, coming into his hands as such county treasurer, and did not disburse the same pursuant to law, in this, that on or about December 1, 1903, he paid unto himself the sum of \$500 as compensation or salary for his services as supervisor of assessments in and for said county, for the year 1903; that said sum of \$500 was in addition to his salary as county treasurer, and that, although requested, he has refused to return said money, etc.

It is further stipulated that the board of supervisors were advised by the state's attorney of the county that the defendant's claim was a legal one; that there was no misrepresentation of the facts concerning said claim by the defendant to induce or influence the board to allow and order paid said claim, nor any fraud or deceit practiced by the defendant relative thereto; and that "the board allowed the defendant's claim and directed the county clerk to issue an order to the defendant upon the county treasurer \* \* \* for said amount of \$500 as his compensation for said services." It is admitted by appellant's fourth plea that "he received the said \$500 on the 31st day of March, A. D. 1904."

The contention of appellant is, that inasmuch as the money sought to be recovered was by the board of supervisors of said county voluntarily allowed and

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paid to him without any misunderstanding or misrepresentation of the facts, and without any fraud or deceit on his part in relation to the matter, and that the same was paid under a mistake of law, it cannot be recovered back. It is contended by appellee, and the trial court so held, that the board of supervisors had no authority or jurisdiction to increase the salary or compensation of the county treasurer after his election and during the term of his office; that such action of the board being without authority of law, or without jurisdiction to act upon the subject or to take any action in the matter of increasing or diminishing the salary of the county treasurer during his term, was absolutely void; and that the money in question having been paid out contrary to law, the same can be recovered in the present action upon the official bond of such treasurer.

In Foote v. Lake County, 206 Ill. 185, it was held that the revenue act of 1898 providing that in certain counties, the county treasurer shall be, *ex officio*, supervisor of assessments, does not create a new office, but merely adds new duties to the office of county treasurer; and that the compensation of a county treasurer, according to law, includes payment for his services rendered as *ex officio* supervisor of assessments. Section 10, article 10 of the Constitution of the State of Illinois, requires the county board to fix the compensation of the county treasurer, with the amount of necessary clerk hire, etc., and provides further that the compensation of the county treasurer as well as other officers, shall not be increased or diminished during his term of office.

The statute provides that the time of fixing the compensation of county officers shall be at the meeting of the county board next preceding the election of the officers whose compensation is to be fixed. Rev. Stat. 1905, p. 566. Any attempt of the county board, by resolution or otherwise, to increase or diminish the salary of the county treasurer is therefore without au-

thority of law, and absolutely void. *Foote v. Lake County*, 206 Ill. 185; *Parker v. County of Richland*, 214 Ill. 165.

It is therefore manifest that appellant was not entitled to the sum in question, either as salary as supervisor of assessments, or for extra compensation as county treasurer, and that the board of supervisors had no jurisdiction or authority of law to allow the same or order it to be paid. Their action in the premises was therefore absolutely void, and without legal effect. *People v. Parker*, 116 App. 143.

The contention of appellant that the money having been paid to him voluntarily under a mistake of law cannot be recovered back, is without merit. Nothing was paid to him by the county, either voluntarily or otherwise. The action of the board, being an absolute nullity, cannot be invoked for his protection as an individual, for it must be regarded as never having been taken, nor could it place the county in the attitude of having paid the money voluntarily.

In effect the action of the board was to grant appellant an increase of salary as county treasurer. This was a matter over which it had, at that time, no jurisdiction whatever, under which it could act. Had the allowance of the money been within the general scope of authority conferred upon the board by law, but under a misapprehension as to the law, such money, if paid, could not have been recovered back. *People v. Foster*, 133 Ill. 496. No such situation is presented, however, in the case at bar. When the county board, by resolutions, fixed the salary and compensation of the county treasurer for the ensuing four years, its power in the premises was under the constitution exhausted.

The cases cited by counsel for appellant we regard as inapplicable to the facts here involved. In *People v. Foster*, *supra*, the defendant, Foster, as sheriff, presented reports to the county board showing that the fees collected by him and the allowances theretofore

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made to him, did not equal the amount of his compensation for the period covered by such reports, and upon demand, by him, the board ordered the deficiency paid to him from the county treasury. It was held that as the payment, although illegal, was made under a mistake of law, and without fraud or mistake of fact, the money could not be recovered back. It was, however, further expressly stated in the opinion of the court, that the question as to whether the conditions existed authorizing the payment, was one over which the county board had jurisdiction to consider and pass and act upon.

In *Village v. Knopf*, 199 Ill. 444, where the charges of a county clerk to the village for services in connection with certain tax deeds, which charges were alleged to be unauthorized by law, were investigated, settled, and voluntarily paid by the village, it was held that as it was within the scope of the authority of the village to settle the claim, the amount paid in settlement thereof could not be recovered back.

*City v. Whitfield*, 109 App. 120, was a suit to recover back money paid out by the city for legal services for which the city was not legally liable. It was held that the money could not be recovered back. There, too, the adjustment and allowance of claims of the character in question was undoubtedly within the scope of the authority of the city officials.

In *Yates v. Ins. Co.*, 200 Ill. 202, the only question involved was whether where a statute authorizing the levy of certain taxes is void, taxes illegal for that reason, but paid voluntarily, could be recovered back.

It follows that the money in question was paid by appellant, as county treasurer, to himself, without authority of law. It is admitted by his counsel in their brief that such an act would constitute a clear breach of his official bond.

The judgment of the Circuit Court was therefore proper and is affirmed.

*Affirmed.*

**Henry Sheppelman v. The People of the State of Illinois.**

1. INSTRUCTIONS—*when should be accurate.* Where the evidence is close and conflicting, the jury should be instructed with especial accuracy.

2. EVIDENCE—*when rulings upon, must be accurate.* Where the evidence is close and conflicting, the rulings of the court with respect to evidence admitted and excluded must be especially accurate.

3. HEARSAY—*when admission of, ground for reversal.* The admission of hearsay evidence with respect to matters material, is ground for reversal.

4. PROVINCE OF JURY—*when instruction as to weight of evidence invades.* An instruction with respect to the respective value of affirmative and negative testimony, in form as follows, is erroneous in that it invades the province of the jury:

"The court instructs the jury that the evidence of the various witnesses who have testified that they never saw Alonzo Phillips intoxicated, is negative evidence only, and does not disprove the affirmative evidence of those witnesses who testified to having seen him intoxicated."

5. INTOXICATING LIQUORS—*when competent to show habit of drinking.* In a criminal prosecution for selling intoxicating liquors to one in the habit of getting intoxicated, it is competent to permit witnesses to testify directly as to the habit of the person in question in respect to the use of intoxicating liquors.

Criminal prosecution for sale of intoxicating liquors. Error to the County Court of Ford county; the Hon. H. H. KERR, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

SCHNEIDER & SCHNEIDER, for plaintiff in error.

W. H. STEAD and L. A. CRANSTON, for defendant in error.

Mr. JUSTICE PUTERBAUGH delivered the opinion of the court.

An indictment consisting of three counts was returned against plaintiff in error charging him with having sold intoxicating liquors to one Phillips who, as it was alleged, was a person then and there in the habit of getting intoxicated. The indictment was certified to the County Court and a trial there had. The

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jury returned a verdict of guilty upon three counts. Judgment was entered upon the verdict, and a fine of \$90 and costs imposed.

It was further ordered that the defendant stand committed to the jail of Ford county until such fine and costs were paid. To reverse the judgment in question this writ of error is prosecuted.

It was not denied by plaintiff in error on the trial that he had sold intoxicating liquor to Phillips on several occasions. The main question in controversy was whether Phillips at the time was a person who was in the habit of getting intoxicated. Four witnesses called by the People testified that they had seen Phillips under the influence of intoxicating liquors and that in their opinion he was in the habit of becoming intoxicated, while thirteen witnesses for plaintiff in error testified that they had never seen him under the influence of liquor and that in their opinion he was not in the habit of becoming intoxicated. The evidence may therefore well be said to have been both close and conflicting. Hence it was imperative that the jury should have been accurately instructed as to the law and that the rulings of the court upon the evidence have been free from substantial error.

One Thompson was called as a witness on the part of the People. After he had testified that he had seen Phillips under the influence of intoxicating liquor frequently, the record shows that, over the objections of plaintiff in error, he was asked and permitted to answer certain questions as follows:

“Q. Do you know how much money he has squandered in the last two years by his drinking habits?

A. I don’t know.

Q. You know whether he is making money or losing money in the last two years, do you?

A. From things that have come to my knowledge I would say that he was losing money.

Q. From things that have come to your knowledge

and otherwise how much has he lost within the last two or three years?

A. Several thousand dollars."

Proper exceptions were preserved to the rulings of the court, in each instance. The testimony in question was improperly admitted and was doubtless highly prejudicial to plaintiff in error.

The statements of the witness, so far as based upon "things that had come to his knowledge and otherwise," were undoubtedly but mere conclusions derived from hearsay. The question, in effect, called for what the witness had heard relative to Phillips' losses, which was clearly incompetent evidence for any purpose.

The sixth instruction given at the request of the People reads as follows:

"The court instructs the jury that the evidence of various witnesses who have testified that they never saw Alonzo Phillips intoxicated, is negative evidence only, and does not disprove the affirmative evidence of those witnesses who testified to having seen him intoxicated."

In view of the conflict in the evidence the giving of this instruction was palpable and prejudicial error. The force and weight to be given to the testimony of the respective witnesses was a matter to be determined by the jury, and with which the court should not have interfered. *R. Co. v. Otstot*, 212 Ill. 429; *R. Co. v. Robinson*, 106 Ill. 145; *R. Co. v. Shires*, 108 Ill. 632; *R. Co. v. Feehan*, 149 Ill. 203; *Frizell v. Cole*, 42 Ill. 362; *Rockwood v. Poundstone*, 38 Ill. 200. While it is doubtless true, as is said in *Murphy v. People*, 90 Ill. 59, that affirmative evidence is in some cases as a matter of fact necessarily of more probative force than negative evidence, it is improper to so instruct a jury as a matter of law. It is urged that it was error for the court to permit witnesses to testify as to whether Phillips was in the habit of drinking intoxicating liquors to excess. The Supreme Court has held such evidence to be competent. *Gallagher v. Peo-*

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ple, 120 Ill. 179. We perceive no serious error in the other rulings of the court upon instructions and evidence. For the reasons indicated the judgment must be reversed and the cause remanded.

*Reversed and remanded.*

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**Richard I. Hall v. The People of the State of Illinois.**

1. INFORMATION—*when need not be verified.* An information signed by the state's attorney need not be verified.
2. INFORMATION—*effect of failure to indorse names of witnesses upon back of.* The validity of an information is not affected by the failure to indorse upon the back thereof the names of the witnesses upon whose testimony the same was returned.
3. INTOXICATING LIQUORS—*what within term of.* The word "beer" when employed in connection with sales in a place where intoxicating liquors are usually sold, means an intoxicating drink.

Criminal prosecution for sale of intoxicating liquor. Error to the County Court of DeWitt county; the Hon. F. C. HALL, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

JOHN FULLER, HERRICK & HERRICK and EDWARD J. SWEENEY, for plaintiff in error.

ARTHUR F. MILLER and E. B. MITCHELL, for defendant in error.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

Upon an information filed by the state's attorney charging with having unlawfully given intoxicating liquor to one Bertie Robinson, a minor, plaintiff in error was found guilty and sentenced to pay a fine of \$100 and costs, and to be confined in the county jail for a period of thirty days, and until the fine and costs were paid.

It is first urged as a ground for reversal of such judgment, that the information was not verified by

affidavit. Inasmuch as it was signed by the state's attorney, this was unnecessary. *Samuel v. People*, 164 Ill. 384.

Complaint is made that the names of no witnesses were indorsed upon the back of the information. We do not understand that this was essential, and no authority to that effect has been cited.

It is also contended that the court erred in giving to the jury certain instructions in which it was assumed that Robinson was given liquor by some one and that the same was intoxicating. The proof adduced by the People tended to show that Robinson was seen in the saloon of plaintiff in error on the day charged, with a bottle in his hand. The witnesses Anderson and Hanson testified that they saw him drink therefrom, and Anderson said that it contained a liquor that smelled like beer.

The word "beer," when employed in connection with sales in a place where intoxicating liquors are usually sold, means an intoxicating drink. *Myers v. State*, 93 Ind. 251, 9 L. R. A. 665. Furthermore, Prof. Conrad, a chemist, testified that he had analyzed the contents of the bottle in question and found that the same contained over four per cent. of alcohol. The only witnesses called in behalf of plaintiff in error were himself, Crawford, his partner, and their bartender, each of whom denied that he gave or sold any beer or intoxicating liquor to Robinson on the day in question. In this they are corroborated by Robinson who while admitting that he had a bottle in his hand at the time and place charged, denied that he drank from the same or knew its contents. The jury was fully warranted in the belief that Robinson's testimony was, to say the least, exceedingly improbable.

The only serious conflict on the trial seems to have been as to whether the beer was sold or given to Robinson by plaintiff in error or by anyone acting

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for him. That Robinson received beer from some one and that it was intoxicating does not seem to have been controverted. In this state of the evidence we are satisfied that the error in the instructions complained of by plaintiff in error could not have affected the verdict.

The judgment is affirmed.

*Affirmed.*

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**John W. Dickson v. John Owens.**

1. **VERDICT**—*when not disturbed as against the evidence.* A verdict will not be set aside as against the weight of the evidence unless the conclusion of the jury is manifestly against the weight of such evidence.

2. **REAL ESTATE BROKER**—*what essential to recover commissions.* In order for a real estate broker to recover commissions for a sale effected by his principal, it must be shown that he was the procuring cause of such sale.

3. **CONTRACT**—*what sufficient consideration for modification of.* While a contract remains executory, an agreement to annul or modify the same by one party is a consideration for a like agreement by the other.

Action commenced before justice of the peace. Appeal from the Circuit Court of Fulton county; the Hon. R. J. GRIER, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

HARRY M. WAGGONER and M. P. RICE, for appellant.

LUCIEN GRAY, for appellee.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This action was originally brought by appellant Dickson before a justice of the peace, for the recovery of commissions alleged to be due to him from appellee Owens, for services in selling a farm. Upon a trial

in the Circuit Court judgment was rendered upon the verdict of a jury in favor of appellee.

The terms of the original agreement between the parties, which are uncontested, were that appellant was to undertake the sale of appellee's farm of 120 acres at \$70 per acre. He was to have until January 1, 1906, to make the sale, and if he succeeded in doing so was to receive \$1 per acre as his compensation. On October 28, 1905, appellee himself sold the farm to one Beam. On the same day, but prior to such sale, a modification of the agreement had been made by the parties, the terms of which are in dispute. Appellee testified that at that time he asked appellant if he would charge him commissions if he, appellee, sold the land himself, and that appellant replied that he would not if appellee sold to some one with whom he, appellant, had not talked; while appellant testified that appellee asked him if he would give him, appellee, the privilege of selling the farm to any one that he, appellant, had not talked to nor had interested, and that appellant replied that he would as to any person except Beam; that while he, appellant, had not talked to Beam about the property, he had talked to Hilton who was Beam's partner. Appellant further testified that after the making of the original contract he talked to a number of possible purchasers of the land and showed one party the land; that while he had never talked with Beam about the farm he did have two conversations with Hilton in regard thereto; that although the sale was nominally made to Beam, it was in fact to Hilton and Beam as partners. Both Hilton and Beam testified that Hilton was not interested in the purchase either as a partner of Beam or otherwise. It was the province of the jury to decide these controverted questions of fact. If they found in favor of appellee upon such issues, it cannot be said that their conclusions were so manifestly against the evidence as to warrant this court in disturbing the same.

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It is contended however that the court erred in its rulings upon the evidence and instructions to the prejudice of appellant. Appellant offered to prove by several witnesses, including himself, that before appellee became the owner of the farm, appellant was acting as agent for Mrs. Hull, the former owner, and that one Bishop in behalf of the firm of Beam and Hilton sought to purchase the same through the agency of appellant, but the court held such evidence to be incompetent. It is insisted that it was competent as tending to show that appellant, at the time of the original contract, knew Bishop as a prospective purchaser, thereby corroborating appellant in his version of the modified contract, and was proper to be considered by the jury in determining whether or not Beam was excepted from its terms. In the absence of written pleadings the nature of the plaintiff's demand must be ascertained from the bill of particulars, which, in effect, limited and restricted the plaintiff on the trial to proof of the particular cause of action therein mentioned. *Brewery v. Farnsworth*, 172 Ill. 247. That filed with the justice stated that the claim or demand of plaintiff was for "Commissions due from said Owens to said Dickson, in the matter of sale of a farm, 120 acres owned by said Owens, situated in Putnam township, Fulton county, Ill., \$120.00."

Under the terms of the contract, appellant could only recover commissions by proving that he was the procuring cause of the sale. That the sale was nominally made to Beam was proved by the introduction in evidence by appellant of the contract of sale between appellee and Beam. Appellant did not claim to have talked or negotiated with Beam personally. He could only recover in this action by showing that the purchase was in fact made either by Hilton with whom he had negotiated, or by Beam and Hilton jointly. As to by whom the land was actually bought was therefore the chief and controlling issue in the case,

and that upon which a right of recovery turned. It follows that whether or not Beam was excepted by the terms of the contract as modified, was immaterial. For this reason the giving of appellee's third and fourth instructions was not prejudicial.

Complaint is made of appellee's sixth instruction which contains a prefatory statement to the effect that an owner of land although he has appointed another sole agent for the use thereof, can sell the same himself and not be liable to the agent for commissions. While it is true that under the circumstances recited, the owner might be liable to the agent for damages for a breach of the contract (*Metzen v. Wyatt*, 41 Ill. App. 487), and to an amount equal to the commissions agreed upon in case of a sale, in a direct suit for the recovery of commissions, upon the theory of performance, he would be liable only in the event that the agent in some way brought the owner and purchaser together, or in some way, assisted in bringing about the sale. *Woolf v. Sullivan*, 224 Ill. 509. The instruction was therefore not erroneous, although not to be commended, being abstract in form.

Appellant's fifteenth and eighteenth instructions to the effect that any modification or change of the original contract would not be valid and binding upon appellant unless based upon a good consideration, were properly refused. While a contract remains executory, an agreement to annul or modify the same by one party is a consideration for a like agreement by the other, and *vice versa*. *Barrie v. King*, 105 Ill. App. 426, and cases cited.

Appellant's refused sixteenth and seventeenth instructions which laid down the law as to general liability for the termination of a contract by one party, without default or consent on the part of the other, were not applicable to the present case, which, as has been said, was not predicated upon a breach of the contract in question. The exclusion of the testimony

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of the witnesses Bishop and Smith was not error for the reasons heretofore stated.

We find no prejudicial error in the record, and the judgment must accordingly be affirmed.

*Affirmed.*

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**Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Charles Curtis.**

1. **CONTRIBUTORY NEGLIGENCE**—*what evidence not competent upon question of.* It is not competent to permit a witness to testify in substance or in effect as to whether or not in his opinion it was negligence to do or to attempt to do the act contended as constituting contributory negligence.

2. **EXPERT**—*when opinion of, not competent.* Where the matter inquired about requires no special knowledge and all the facts upon which such opinions are sought to be based, can be ascertained and made intelligible to the court and jury, it is not proper to receive the testimony of experts.

3. **FEDERAL STATUTE**—*effect of section 8 of act enacted for the promotion of safety of employes.* Section 8 of the Federal statute enacted for the promotion of the safety of employes, which is to the effect that any employe of a common carrier who may be injured by any locomotive, car or train, in use contrary to the provisions of the act, shall not be deemed thereby to have assumed the risk occasioned thereby, does not abrogate the common law rule that an employe using cars not equipped with the appliances mentioned in the act must exercise ordinary care.

4. **ASSUMED RISK**—*doctrine of, considered with respect to the doctrine of contributory negligence.* The doctrines of assumed risk and contributory negligence are separate and distinct.

Action in case for personal injuries. Appeal from the Circuit Court of Edgar county; the Hon. MORRON W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Reversed without remanding. Opinion filed June 1, 1907.

HAMLIN & GILLESPIE and R. L. MCKINLAY, for appellant; L. J. HACKNEY, of counsel.

F. W. DUNDAS, for appellee; F. J. O'HAIR, of counsel.

MR. JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case for the recovery of damages for personal injuries alleged to have been received by the plaintiff through the negligence of defendant. Judgment was rendered in favor of the plaintiff for \$1,999.99, to reverse which this appeal is prosecuted.

The undisputed evidence shows that appellee had been a brakeman in the employ of appellant for about five years. On the day he was injured he was acting as "swing man" or center brakeman upon one of appellant's freight trains engaged in interstate commerce or traffic. His duty consisted in switching cars and placing them in and out of the train at various stations. At Robinson station a car of freight was set out. After the train started to leave the station to go southward, and when it had moved about thirty feet at the rate of about two miles an hour, appellee who was standing upon the station platform attempted to get aboard by placing his right hand on the end sill of a box car and his left hand upon the end sill of a coal car in the rear of it and swinging his feet up and catching them on the bumpers or upon the deadwood of the coal car. Through the motion of the train, or from some other cause not shown by the evidence, his hand slipped and he fell down between the rails upon his hands and knees. The conductor of the train who was standing on the front end of the coal car, upon seeing him fall, jumped off on the platform and immediately called to the engineer and gave him the stop signal. The engineer immediately applied the air brakes and stopped the train. When appellee fell he crawled along by the coal car and attempted to get from under the cars. Just before the train stopped, his clothing caught on a bolt at a rail connection and the car wheel caught and stopped upon one of his legs, so crushing and mangling it that it had to be

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amputated. The evidence shows that there were side ladders on a number of box cars in the train by which the plaintiff could have boarded it with safety. The train consisted of sixteen cars, all but three of which were equipped with air brakes, and had the cars so equipped been placed consecutively next to the engine, the train could have been stopped in time to have avoided the injury to appellee, but by reason of the "bald-heads" or cars without air brakes, having been placed toward the front of the train, the line of the brakes was broken so that the air brakes back of the "bald-heads" could not be used. It further appeared that there was in force a rule of the appellant company, which required, in the making of trains, the placing of cars loaded with heavy freight ahead of those containing merchandise.

The negligence relied upon as a basis of recovery, is the alleged non-compliance by appellant with the terms of the Federal statute for the promotion of safety of employes, etc., section 1 of which reads as follows: "That from and after the 1st day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power or driving wheel brake, and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." (Act March 2, 1893, Chap. 196, 27 Stat. L. 531.)

A reversal of the judgment is urged upon the following grounds: (1) The plaintiff assumed the risk of attempting to get aboard the train as he did, and was guilty of contributory negligence; (2) the Federal statute has no application to the facts; (3) the defendant had in its train a sufficient number of cars

so equipped with power or train brakes that if coupled up and utilized, the engineer on the locomotive drawing such train could have controlled its speed without requiring the brakeman to use the common hand brake, and its statutory duty was thereby discharged; and no rule of the company was proved to have been in force which justified the plaintiff in not using the power or train brakes on the train.

Over the objections of appellant, the trial court improperly permitted appellee to prove by the witnesses Dixon and Hawkins, that the manner in which he was attempting to get aboard of the train at the time he fell and was injured was "proper." In effect such witnesses were permitted to testify as a matter of opinion that in attempting to get aboard of the train as he did the plaintiff was not guilty of contributory negligence, which was one of the issues to be determined by the jury. Such testimony was not proper to be given by an expert witness, nor was the question one upon which a non-expert witness could properly express an opinion. A witness is not permitted to give his opinion as an expert in reference to a matter which does not involve a question of science, skill or trade. Where the matter inquired about requires no special knowledge and all the facts upon which such opinions are sought to be based, can be ascertained and made intelligible to the court and jury, it is not proper to receive the testimony of experts. *R. Co. v. The People*, 143 Ill. 434; *R. Co. v. Conlan*, 101 Ill. 93; *R. Co. v. Smith*, 69 App. 69. The opinions of witnesses are not admissible in evidence merely because such witnesses have had more experience or greater opportunities for observation than others, unless such opinions relate to matters of skill or science. *Heller v. The People*, 186 Ill. 550; *Brewster v. Weir*, 93 Ill. App. 588. Expert opinions may never be given covering the questions or issues to be decided by the jury. *R. Co. v. The People*, *supra*; *R. Co. v. Blye*, 43 App. 612; *R. Co. v. S. & N. R. Co.*, 67 Ill. 142. The

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question as to the care being exercised by a plaintiff at the time of his injury, is one for the jury, and cannot be decided by the opinions of experts. *City v. Coe*, 166 Ill. 22. The question whether a certain act or omission imported negligence under the given circumstances is not one which can be determined by expert testimony. *Labatt on Master and Servant*, sec. 830; *2 Jones on Evidence*, sec. 374.

In the view we take of the law applicable to the uncontested facts involved, it will be unnecessary to determine whether or not the Federal statute quoted has any application or whether or not appellee assumed the risk of injury. After a full consideration of the evidence, we are impelled to the conclusion that the attempt of appellee to board the train in the way and manner shown by the evidence, was not the act of a reasonably prudent and careful person under similar circumstances, and that his negligence in that particular was the direct and immediate cause of his injury. His right of recovery is thus barred without regard as to the question as to whether or not the Federal statute is applicable. The effect of section 8 thereof, which provides that any employe of a common carrier who may be injured by any locomotive, car or train, in use contrary to the provisions of the act, shall not be deemed thereby to have assumed the risk occasioned thereby, is merely to abrogate the common law rule that an employe using cars not equipped with the appliances mentioned in the Act, assumed such risk and danger of his employment as arises from the use of such appliances, when the same are known by him to be defective, insufficient and dangerous or which are so obviously so that by the exercise of ordinary care, he would know of such fact. The section does not to any extent abrogate, change or modify the well-settled rule that an act of omission on the part of the servant amounting to a want of ordinary care which, concurring or co-operating with the negligent act of the master, is the proximate cause

or occasion of an injury to the servant, will bar a recovery by such servant, or, in other words, in order to recover for injuries received by him, the servant must aver and prove that he was, in relation to the accident, in the exercise of ordinary care at the time he received such injuries.

Counsel in argument seems to have confounded the distinct and separate doctrine known as "assumed risk" with that of "contributory negligence." As is said in *R. Co. v. Heerey*, 203 Ill. 492, "Contributory negligence and assumption of risk are entirely different things in the law. Although the two questions may both arise under the facts of the case, yet they are wholly separate and distinct. Every person suing for a personal injury must show that he was in the exercise of ordinary care and caution for his own safety."

Appellee, in attempting to board the train, fell between a coal car and a box car, the latter being south and next ahead of the coal car. Upon the coal car, some six or eight inches from the south end, there was an iron stirrup which extended eight or ten inches below the sill of the car, and above such stirrup was an iron hand-hold, eight or ten inches long. A large number of the box cars were equipped with side-ladders by the use of which appellee could have boarded the train with safety. Appellee, when testifying, offered no excuse for his failure to use the side ladders. As to the stirrup and hand-hold, he says, "If I had put my foot in the stirrup maybe I would have fallen outside of the track and maybe I wouldn't."

It seems clear, in view of the foregoing evidence, that appellee, who was an experienced brakeman, with full knowledge of the facts, voluntarily adopted a dangerous method of boarding the train when a manifestly safer one was at hand. Disregarding the question as to whether he thus assumed the risk of injury, we are satisfied that the undisputed facts, together

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with all the natural inferences to be drawn therefrom, fail to show that he was in the exercise of that degree of care for his own safety required by law as precedent to recovery. Such conclusion is so plain and clear that we feel all ordinarily prudent men would arrive thereat after a dispassionate consideration of the evidence. The admission of the testimony of Dixon and Hawkins to the effect that the method adopted by appellee in attempting to board the train was proper, doubtless tended to lead the jury to find in favor of appellee upon that issue.

For the reasons stated the judgment of the Circuit Court must be reversed without remanding.

*Reversed.*

Finding of fact to be incorporated in judgment:

We find from the undisputed evidence that in attempting to board the train in the manner shown by the evidence, appellee, Charles Curtis, was guilty of negligence, which was the proximate cause of the injuries received by him for which he seeks to recover.

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#### Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Harrison F. Pinnell.

**CARRIER—when error to exclude contract of shipment from jury.** It is error to exclude a contract of shipment from the jury where there is evidence tending to show that the shipper knew of the contents of such contract and assented to the restrictions contained therein.

Action on the case. Appeal from the Circuit Court of Edgar county; the Hon. J. W. CRAIG, Judge, presiding. Heard in this court at the May term, 1905. Reversed and remanded. Opinion filed June 1, 1907.

C. S. CONGER and R. L. MCKINLAY, for appellant.

DUNDAS & O'HAIR, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Harrison F. Pinnell brought suit in the Circuit Court of Edgar county to recover damages alleged to have been sustained by him through the negligence of appellant in delaying a shipment of cattle made by Pinnell from Kansas, Illinois, to Chicago. There was a judgment in favor of Pinnell in the sum of \$250 from which the railway company has appealed.

It appears from the evidence that appellee, on November 24, 1903, at about eight o'clock p. m., shipped fifty head of cattle from Kansas, Illinois, consigned to Chicago, and that the customary time required for such shipment between such shipping point and Chicago was about eighteen hours.

Appellee contends that appellant was negligent in delaying prompt shipment from Kansas, Illinois, and in allowing the cattle to remain in the cars from about eight p. m. until after eleven o'clock p. m. before leaving such shipping station; that there was negligent delay between the point of shipment and Chicago so that the cattle did not reach Chicago until late in the night of the day following the shipment; that as the next day after the arrival of the cattle in Chicago was a holiday, no sale could be made until the third day following the shipment, and in consequence his cattle became "stale" upon the market and he suffered a loss for which appellant should be held responsible.

Upon the trial appellant offered in evidence a contract of shipment signed by appellee, which limited appellee in his right of recovery and provided that no claim for damages accruing to the shipper under the contract should be allowed or paid by the carrier, or suit brought in any court, unless the shipper filed a claim in writing therefor, verified, in the office of the freight claim agent in the city of Cincinnati, Ohio, within five days from the time the stock was removed from the cars. To this offer an objection was made which was sustained by the court, to which action of the court appellant excepted.

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At the close of all the evidence the court gave for appellee a peremptory instruction directing the jury to find the issues in favor of appellee and assess his damages at such sum as they should think, from the evidence, he had sustained, to which action of the court exception was also taken by appellant. This action of the court would seem to have been taken upon the assumption that there was no evidence in the case even tending to show that appellee knew the contents of the shipper's contract, or that he ever assented to its terms. In this there was error.

While it is true that in his testimony appellee denied that he read the contract or knew its contents, yet he admitted that he had signed it; that he had an ordinary education and could read; that he had been engaged in shipping stock for about twenty years and frequently over the road of appellant; that he had signed many contracts of the same character, or similar in form, and knew this was a live stock contract and that the shipment of the cattle in question was made under the contract offered in evidence by appellant. The issue, thereupon, became an issue of fact for the jury to determine and not a question of law.

While it is true that under the decisions of the Supreme Court of our state it has been held that the mere receiving of a contract of shipment containing limitations, without notice of such limitations and restrictions to the shipper, does not of itself amount to an assent thereto upon his part, and that the burden of proof is upon the carrier to show assent upon the part of the shipper to such limitation, yet where there is any evidence tending to show notice it is for a jury to determine from all the evidence and circumstances whether or not the shipper did, as a matter of fact, know of the contents of the contract and assent to its terms. B. & O. S.-W. R. R. Co. v. Fox, 113 Ill. App. 180-187.

The evidence in the case at bar was not conclusive to the effect that appellee knew of the terms of the

contract, or assented thereto, but it was of a character tending to show such knowledge and should have been submitted to the jury as an issue of fact.

The court's refusal to submit that issue to the jury was prejudicial error. The judgment is reversed and the cause remanded.

*Reversed and remanded.*

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### Wabash Railroad Company v. E. D. Smith.

1. *WAGES—when contract of service does not prohibit assignment of.* A contract of service does not prohibit an assignment of wages so as to render the same null and void where the provision with respect thereto is that assignments when made are ground for immediate dismissal, and this especially in view of the fact that the employer had in some instances recognized assignments.

2. *WAGES—when assignment of, effective.* An assignment of wages earned during a particular period is effective to pass title thereto regardless of whether the rate of payment is increased or lessened during the period referred to in the assignment.

3. *WAGES—effect of authority to collect, contained in assignment.* An assignment of wages which contains an authority to the assignor to collect on behalf of the assignee, does not preclude such assignor from asserting his right to collect upon his own behalf.

**Assumpsit.** Appeal from the Circuit Court of Macon county; the Hon. W. C. Johns, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

HUGH CREA and H. W. HOUSUM, for appellant; C. N. TRAVOUS, of counsel.

LEFORGE & VAIL, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

E. D. Smith, for the use of John L. Bennett, brought suit in the Circuit Court of Macon county against the Wabash Railroad Company to recover wages due from said railroad company to Smith and by Smith assigned to Bennett. The case was tried before the court with-

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out a jury, a judgment rendered in favor of Smith for Bennett's use against the railroad company in the sum of \$108.85, and the railroad company appealed.

The case was tried upon a stipulation of facts which is too long to be incorporated in an opinion, but which showed the facts to be in substance as follows: On April 17, 1904, Smith, who was an engineer in the employ of appellant, being indebted to Bennett, gave him his note for \$105, with interest at seven per cent. due in ninety days from said date, and on October 17, 1904, gave his renewal note extending payment to January 17, 1905. Smith also executed and delivered to Bennett three blank instruments in which said instruments said Bennett afterward filled the blanks, whereupon said three instruments with the blanks filled in substance amounted to an assignment to Bennett of the salary or wages due or about to become due to said Smith as engineer from appellant, as per verbal contract commencing April 27, 1904, at \$4.25 per hundred miles, which assignment authorized Bennett to collect, receive and receipt for all salary and proceeds arising from said contract and directing said railroad company to pay the same to Bennett. Said instruments also provided that Smith, in consideration of Bennett's having bought his salary and wages from said appellant, should collect said wages when due, as the agent of Bennett and for his sole use and benefit and deliver the whole thereof to Bennett; Bennett was to have the right, however, to file the written assignment with appellant and collect the same himself, if he, at any time, saw fit to do so. As a part of the said instruments there was an affidavit made by Smith to the effect that Smith had actually earned at that time \$105 as such salary, and that no payment had been made to him, or any part previously assigned; that he had made the assignment to Bennett for the express purpose of borrowing money and had given him assignments in blank, with full authority to him to fill out and present to appellant and enforce the same

if he (Smith) failed to comply with said agreement. On January 28, 1905, such assignment was filed with appellant company, and on January 31, 1905, said Smith, having quit the service of appellant, or been discharged therefrom, on January 26, 1905, called for his wages due at division headquarters and was informed there that the assignment to Bennett had been filed and payment was refused him. Upon such refusal and upon the same day Smith wrote a letter to the general counsel of appellant asking that a check for \$120.91, covering his wages for the month of January, be sent to Bennett at an early date stating that he was no longer in the service of the company and desired a settlement.

From such stipulation it further appeared that there was no express contract as to the wages Smith should draw during his employment other than a rate upon each one hundred miles, varying from time to time at the option of the appellant; that there was no salary due to Smith prior to January 1, 1905; that appellant had no notice that Smith was indebted to Bennett prior to the filing of the notice of assignment on January 28, 1905; that from January 1st to January 26th, Smith earned, while in the employ of appellant, the sum of \$125 (part of it at \$3.50 per one hundred miles, part at \$3.65 per one hundred miles and the balance at \$4.25 per one hundred miles); that prior to the service upon appellant of the assignment of January 28th, appellant had accepted and agreed to pay and deduct from the wages of Smith, the sum of \$6 upon Smith's order in favor of Wm. Gause & Bro., and that Smith had earned the sum of \$125 in January, before the twenty-eighth of that month, and that appellant owed him the balance of the \$125 after deducting the \$6 item above referred to and an assessment of fifty cents due the Wabash Hospital Association.

It also appeared from such stipulation of facts that appellant paid Smith the balance due him, on the fourth day of February, 1905, without the knowledge

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or consent of Bennett and that no part of the debt from Smith to Bennett had been paid; that at the time that Smith entered the employment of appellant he signed a paper in the words, to wit: "I understand that the assignment of wages due from Wabash Railroad Company is strictly prohibited and subjects any employe executing such assignment to immediate dismissal from the service of the company and I hereby accept service with said company subject to said conditions."

It further appeared from the stipulation that the letter from Smith dated January 31, 1905, written to the general counsel of appellant requesting payment of the amount due, to be made to Bennett, was not received by such officer until after a check for Smith's wages had been mailed to the superintendent of appellant at Decatur, which was the usual way of paying discharged employes on that division of appellant's road, and that the official of appellant at Decatur, upon whom legal notices were served, was one Lewis, agent at Decatur, who had nothing to do with the employment or discharge of employes, or with the payment of employes who quit or were discharged from the service of appellant.

Appellant first contends that the attempted assignment of wages by Smith was void because of the statement signed by him, in which he acknowledged that assignment was prohibited by the terms of his employment, and great reliance is placed upon the case of *Mueller v. Northwestern University*, 195 Ill. 236-249, in support of that contention. The contract in the case just referred to provided in express terms that the contractor should not sell or assign his contract or any part thereof, or interest therein, without the consent in writing of the architects and that any assignment without such consent should be absolutely null and void.

In the case at bar there was no provision in the contract that an assignment by the employe should be

null and void as in the Mueller case, but there was the provision that assignments were prohibited and, if made, were ground for immediate dismissal from the company's service. This difference alone might not determine us in holding that the employment contract, by its terms, permitted an assignment; but we are constrained to hold that as the meaning of such employment contract, upon this phase of the case, is doubtful, it is proper to ascertain what construction the parties themselves by their conduct have placed upon it. *Mueller v. Northwestern, Idem.* From the stipulation of facts it appears that prior to the service of the assignment upon appellant on January 28, 1905, it had accepted and agreed to pay and deduct from the wages of Smith, the sum of \$6, upon an order given by him in favor of Gause & Bro., and that such sum was deducted from the \$125 earned by Smith in the month of January. It also appears that after Bennett had filed his assignment with the appellant company and on January 31, 1905, when Smith called at division headquarters for his wages, payment thereof was refused and he was informed that the assignment to Bennett had been filed and payment refused (presumably upon that account). Such conduct upon the part of appellant tended strongly to show that appellant understood and construed the contract to mean, not that an assignment was absolutely null and void, but that such an act would afford the railroad company ground for dismissing Smith at any time, without giving any excuse therefor other than the making of the assignment. The trial court was therefore not in error in holding that while assignments of wages were prohibited by appellant, yet it, appellant, recognized and acted upon them when made, reserving to itself the right summarily to dismiss from its service employes who made such assignments.

Appellant next contends that the alleged assignment is insufficient because it purports to assign wages at the rate of \$4.25 per 100 miles, when the wages earned

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by Smith in January, 1905, were at another or different rate or rates per 100 miles; that such an instrument should be strictly construed and cites the case of Wabash Railroad Co. v. Papin, 119 Ill. App. 99, in support of that contention.

We do not regard the Papin case as at all conclusive upon the contention made by appellant in this case. The court in that case held that the assignee was bound by the statement in the assignment transferring him the salary of Papin for the month ending on March 31, 1904. There was an express limitation, as to the time when the salary should have been earned by the terms of the assignment. In the case at bar the rate of \$4.25 per 100 miles was the rate which, in fact, Smith was earning when he made the assignment. When all three of the papers executed by Smith are considered together, as they should be properly (*Wabash R. R. Co. v. Papin, supra*), it would seem that the assignment was for Smith's salary or wages which at that time were \$4.25 per 100 miles *without any limitation* or suggestion to the effect that such wages might not be increased or lessened from time to time thereafter. The wages were to be those to be earned *after April 27, 1904*, and without regard to any exclusive rate.

Appellant also contends that by the terms of the three instruments executed to Bennett by Smith, that Smith agreed to collect his wages when due from appellant as the agent of Bennett and turn them over to him and that such power to collect authorized Smith to receive and receipt for the money in spite of Bennett's rights and in defeat thereof.

This is a strained construction of the contract and one that we cannot approve. In the instrument alluded to and in which the authority is given to Smith to collect such wages as the agent of Bennett, it was expressly agreed that the authority given to Smith to collect should not divest Bennett of the right to file the written assignment with appellant before or after the wages became due, at any time he should see fit.

In pursuance of the right so given to Bennett he filed his assignment with appellant while the wages of Smith to an amount in excess of his (Bennett's) claim were still in the hands of appellant unpaid to Smith. When Smith called at division headquarters he was notified that the assignment to Bennett had been filed and payment refused. Payment thereafter made by appellant to Smith would be made at the peril of appellant, so far as it tended to impair the rights of Bennett.

It is unnecessary to discuss any of the contentions made by appellant other than those already stated. The judgment of the trial court was right upon the facts as stipulated and is affirmed.

*Affirmed.*

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#### Wabash Railroad Company v. A. V. Burch.

This case is controlled by the decision in Wabash Railroad Co. v. Smith, *ante*, p. 574.

Assumpsit. Appeal from the Circuit Court of Macon county; the Hon. W. C. JOHNS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

HUGH CREA and HUGH W. HOUSUM, for appellant; C. N. TRAVOUS, of counsel.

LEFORGE & VAIL, for appellee.

PER CURIAM. The questions involved in this case are practically identical with those discussed in the case of Wabash Railroad Company v. E. D. Smith, for the use of John L. Bennett, *ante*, p. 574.

The holdings announced in that case are decisive of this case, and the judgment in favor of appellee and against appellant in the sum of \$54.05 is affirmed.

*Affirmed.*

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Jarrett v. McIntyre.

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**James Jarrett v. David T. McIntyre.**

1. REPLEVIN—*when justice without jurisdiction in action of.* A justice has no jurisdiction in an action of replevin where the property involved is worth over two hundred dollars.

2. REPLEVIN—*when Circuit Court without jurisdiction in action of.* The Circuit Court is without jurisdiction in an action of replevin appealed from a justice where the justice had no jurisdiction of such action.

3. REPLEVIN—*when jury may determine value of property involved in.* It is proper to permit the jury to determine the value of property involved in a replevin suit before a justice in order to determine whether such value is in excess of the jurisdiction of the justice.

Replevin. Appeal from the Circuit Court of Adams county; the Hon. ALBERT AKERS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**H. M. SWOPE and DAVID P. STRICKLER, for appellant.**

**CHARLES B. McCROY, HOMER D. DINES and GOVERT & LANCASTER, for appellee.**

**MR. PRESIDING JUSTICE RAMSAY** delivered the opinion of the court.

James Jarrett brought suit in replevin before a justice of the peace in Adams county against David T. McIntyre, to recover possession of a lot of tools and fixtures. Upon a trial before such justice of the peace and a jury, the issues were found in favor of McIntyre, whereupon Jarrett appealed the case to the Circuit Court of Adams county, where it was again tried. Upon the latter trial the jury returned a verdict in favor of McIntyre with a special finding to the effect that the property involved was worth \$205 at the time the suit was commenced. Thereupon the court, after overruling a motion for a new trial, dismissed the suit for want of jurisdiction and awarded a return of the property to McIntyre from which judgment Jarrett has prosecuted this appeal.

Upon the special finding that the property involved was worth over two hundred dollars, the trial court was without jurisdiction and could enter no judgment except one having for its effect a dismissal of the suit. Paragraph 5 of Article 2 of Chapter 79 of the Revised Statutes, limits the jurisdiction of justices of the peace in replevin suits to actions where the value of the property claimed does not exceed two hundred dollars. When it turns out, upon the trial of a suit in replevin, that the value of the property in question is more than two hundred dollars, the only authority which a justice of the peace has is to order a return of the property to the defendant, and if the justice of the peace had no jurisdiction then none can be acquired by the Circuit Court by appeal. *Cruickshank v. Kimball Co.*, 75 Ill. App. 233; *Kirkpatrick v. Cooper*, 89 Ill. 210.

Appellant argues that as no witness placed the value of the property at \$205, there was no evidence to sustain the special verdict, and the court was in error in not setting it aside. This, however, is a misconception of the scope of the jury's power. Several witnesses were examined as to the value of the property replevied who varied in their estimates from \$50 to \$375. Where the evidence covers so wide a range it is the province of the jury to determine what value the property had. *Sanitary District v. Cullerton*, 147 Ill. 388.

It is not necessary to discuss appellant's assignments of error to the action of the court in striking out the testimony of the witness, William M. Dickinson, and in giving and refusing instructions, farther than to say, that as to the former of the two assignments no exception was saved to the ruling of the court in striking out of the evidence of the witness Dickinson, while as to the latter, all of the instructions were not abstracted as required by the rules of this court.

The judgment ordering return of the property and

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dismissing the suit for want of jurisdiction at appellant's costs was right and is affirmed.

*Affirmed.*

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**Silas E. Beebe v. Road District No. 1 of Menard County.**

1. **DEDICATION**—*when acceptance of, need not be formal.* While proof of the acceptance by highway commissioners of a road dedicated would be essential in a proceeding to compel them to improve or treat the road as a public road, yet, as against the owner of land, the acceptance of the dedication may be by the general public, which could manifest its acceptance by using the road and thus acquire a right of way.

2. **OBSTRUCTION OF HIGHWAY**—*when additional penalty cannot be assessed for continuance of.* Additional penalty for the continuance of an obstruction upon a highway cannot be assessed where it does not appear that notice had been given to the owner of the land guilty of such obstruction to remove the same.

Action commenced before justice of the peace. Error to the Circuit Court of Menard county; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

CHARLES NUSBAUM and BLAINE & BENNETT, for plaintiff in error.

THOMAS P. REEP and SMOOT & LANING, for defendant in error.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Road District No. 1 of Menard county brought suit before a justice of the peace against Silas E. Beebe to recover a penalty for obstructing in March, 1906, a public highway of said district. A trial was had before such justice and an appeal prosecuted by the road district to the Circuit Court of said Menard county where the case was again tried, upon which latter trial a jury returned a verdict finding Beebe guilty

and assessing a fine against him of \$10. A motion for a new trial was overruled and judgment entered upon the verdict. Beebe brings the case to this court upon a writ of error.

The controversy in the case is whether or not the roadway in dispute had become a public highway by either dedication, prescription or under the statute, prior to the time that the alleged obstruction was placed in such roadway.

Twenty witnesses testified in the case concerning the previous use of the road, about one-half of that number for each party. Upon some questions there was a sharp conflict, but a fair consideration of all the testimony given satisfies us that the jury were fully warranted in returning the verdict they did. There was evidence in the case tending strongly to show that in 1872 or 1873 one Fletcher Council, who then owned the land now owned by plaintiff in error, and upon which the road in question is alleged to have been established, proposed to his neighbors that if they would allow him to fence up an old road that had been used by them at another place across his land in question, he would give the land for a road on the north and west sides of his land and that he thereafter set his fence in, upon his own land, about twenty-five feet from the north and west lines thereof.

Several neighbors testified to the continual use of the road or strip of land so fenced out from that time up to the time of the placing of the obstruction complained of in this suit, except so far as plaintiff in error had at one time moved his fence a few feet, which did not materially interfere with the use of the road. The evidence further tends to show that there was some work done upon the strip in question, such as the construction of two culverts and some road work in discharge of poll tax. The evidence also tended to show that the use of such roadway had been continuous, open and adverse, with the knowledge and

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acquiescence of the plaintiff in error and his grantor for a period considerably in excess of twenty years.

Plaintiff in error in March, 1906, reset his road fences and fenced into his field a large part of the road as then traveled and used by the public, which included a good share of both of said culverts, which resetting of his fence was the obstruction complained of in this suit.

Plaintiff in error contends that said road, or rather its continuation, had been altered or changed at places other than upon his land and that as the roadway at such other places depended upon a prescriptive use, there could be no road established at such other places and consequently there could be no road so established upon his premises. That claim, however, can have no force where the evidence clearly establishes a dedication or a prescriptive right over one's land without regard to other parts of the road. When it is doubtful whether there had been a dedication or whether the user over the place or roadway in question was adverse under a claim of right then it is important to know, if changes were made at *other* places or how the public authorities treated the alleged road at other places. *Town of Brushy Mound v. McClintonck*, 150 Ill. 129-134. In the case at bar the jury were fully warranted in finding that the grantor of plaintiff in error fenced out the road in dispute to be used by the public as a road and that it had been so used for over twenty years continuously prior to the time the obstruction was placed therein.

Plaintiff in error also argues that there could be no road established upon his premises because the same had never been formally accepted by the proper road authorities. There is no merit in this claim. While proof of the acceptance by the authorities would be essential in a proceeding to compel them to improve or treat the road as a public road, yet as against the owner of land, the acceptance of the dedication may be by the general public, which could manifest its ac-

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ception by using the road and thus acquire a right of way. People, ex rel., v. Commissioners of Highways, 52 Ill. 501.

Plaintiff in error also contends that there was error in respect to the rendering of the verdict for the sum of \$10; that there could be no fine imposed, except for an original obstruction of the highway, and nothing could be added for the continuance of the obstruction in the absence of proof that notice had been given to the owner to remove the obstruction. If the record showed affirmatively that the verdict, as returned by the jury, included anything for suffering the obstruction to *remain* in the highway, in addition to what might be rightfully imposed for *placing* an obstruction there, we would be disposed to hold the point well taken; but such is not the case.

Paragraph 71 of chapter 121 of the Revised Statutes provides that a person guilty of leaving or placing an obstruction in a public road shall forfeit not less than three nor more than ten dollars for such offense, and there is nothing in the record to show that the jury did not, by their verdict, fix the punishment at the maximum allowed by the statute, solely for such *placing* of the obstruction in the road.

This is a reasonable presumption under the circumstances and as the verdict can be justified upon that theory, the judgment should not be disturbed upon that contention. Hess v. Rosenthal, Administrator, 55 Ill. App. 324.

The judgment is fully in accord with the merits of the case and as there is no reversible error in the record, the judgment is affirmed.

*Affirmed.*

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Mackey v. Wrench.

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**Jasper D. Mackey v. Ed. Wrench.**

**DRAINAGE—when rights of owner with respect to, limited.**  
The owner of the dominant land is not entitled to discharge the waters of his land at such points as he pleases where he has entered into an arrangement for a mutual system of drainage.

Action commenced before Justice of the peace. Appeal from the Circuit Court of Piatt county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**REED & REED, for appellant.**

**LOTT R. HERRICK and M. R. DAVIDSON, for appellee.**

**MR. PRESIDING JUSTICE RAMSAY** delivered the opinion of the court.

Ed. Wrench brought suit before a justice of the peace against Jasper D. Mackey to recover damages to Wrench's land alleged to have been caused by a tile drain constructed by Mackey upon his (Mackey's) land, which flooded the land of Wrench. Such proceedings were had before the justice of the peace that an appeal was prosecuted to the Circuit Court of Piatt county, where a trial was had before the court without a jury. Judgment was rendered in favor of Wrench against Mackey in the sum of \$1 and Mackey appealed.

It appears from the evidence that appellee owned sixty acres of land lying west of a highway and that appellant owned eighty acres of land on the east side of such highway, the south line of the eighty acre tract being forty rods south of the north line of appellee's land; that the general slope of the surface of such lands is from the north half of appellant's eighty acre tract, and across his south forty, in a southwesterly direction to a bridge, in such highway, near appellant's south line, thence westerly across such high-

way and thence in a general southwesterly course across the land of appellee.

It is admitted by both parties to this controversy, that about the year 1890 or 1891 the then owners of all such lands entered into a mutual agreement and in pursuance thereof constructed or laid a system of tile drain upon said lands, the lower end or outlet of which was in a natural depression or waterway on appellee's land and about seventy rods southwest-erly from the bridge heretofore spoken of; from that point the tile ran northeasterly to the bridge and thence across and what is now appellant's south forty to the north line of that forty, and thence northerly partly across appellant's north forty where it ended; that the greater part of such tile was eight inches in diameter and the balance was six inches in diameter (except a small part thereof, which may have been only five inches in diameter, leading to a pond on appellant's north forty); that connecting with said eight and six inch tile and as a part of such system of tile drain there were three lateral tile drains laid, two on the south forty, of what is now appellant's eighty acre tract, and one on the north forty of such eighty acre tract. It further appears from the evidence that this system of tile drain remained in use and undisturbed upon and across all of said lands from the time it was so laid in 1890 or 1891 until about the year 1905, when appellant, who had in the meantime become the owner of the south forty of his eighty acre tract mentioned, without the consent of appellee and against his objection, laid a new system of tile drain wholly upon his own land the lower end or outlet of which was within a few inches of his west line, opening upon the surface of the ground at the side of the highway and running from that point northeasterly almost parallel with the old tile and only a few feet from it and crossing it in two places, to a pond on the north forty of his eighty acre tract.

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The evidence tended very strongly to show that in laying the new system of tile appellant cut into two laterals of the old drain and connected them with the new drain. Whether he did so connect such laterals and the condition of such laterals, connecting with the old drain, and whether or not much water was wont to flow in them, were questions about which there was considerable dispute upon the trial, but the court who heard the cause came to the conclusion that such laterals were in condition to meet the service for which they were originally laid, and that they were joined or connected by appellant with the new tile laid in 1905. A consideration of all the evidence satisfies us that in this finding the trial court was fully warranted and a review of the evidence upon that subject is not necessary.

The natural result of appellant's work in 1905, was to discharge waters that had formerly gone through the old system of *tile under the surface* to a point in appellee's field about seventy rods southwest of the bridge, upon the surface of the ground in the highway from whence they could, and would in case of heavy rains, *flow over the surface* of appellee's land and damage his crops.

Appellant seeks to justify the work so done by him in 1905 upon the theory that as the general slope of the lands involved was from his own lands to the southwest over and across the field of appellee he had a right to discharge the waters of his lands at such points as he pleased, if done in the course of good husbandry, and cites the cases of Peck v. Herrington, 109 Ill. 611, and Fenton & Thompson R. R. Co. v. Adams, 221 Ill. 201, in support thereof.

These cases, however, have no application here, as the opinions therein do not deal with rights of land-owners who had established a *mutual system* of drainage.

Paragraphs 187 and 189 of chapter 42 of the Revised Statutes provide: "That whenever any ditch or drain

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has been heretofore, \* \* \* or shall be hereafter constructed by mutual \* \* \* agreement of owners of adjoining lands \* \* \* so as to make a continuous line upon or across the lands of said several owners \* \* \* then such drains shall be held to be a drain for the mutual benefit of all the lands so interested therein," and "that whenever drains have been or shall be so constructed \* \* \* none of the parties interested therein shall, without the consent of all the parties, fill the same up or in any manner interfere with the same so as to obstruct the flow of water therein."

Under these sections the owners of lands who have established and constructed a system of drainage for their mutual benefit possess a right to have such system of drainage maintained as established.

Appellant may have the right under the doctrine announced in the case of Peck v. Herrington to improve and drain his own field in the course of good husbandry, even if by doing so he increases the flow of water upon his neighbor's land in a natural waterway or depression, but he has no right in doing so to disturb in any way the flow of waters which would pass off his premises through an outlet provided by a mutual system of drainage.

The judgment was right and is affirmed.

*Affirmed.*

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#### Arthur Lawrence v. The Broadwell Special Drainage District, No. 1.

DRAINAGE DISTRICT—*who may not connect with.* An owner of land lying outside of a drainage district is not entitled to connect with the drain of a district.

Bill for injunction. Appeal from the Circuit Court of Logan county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

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Lawrence v. Broadwell Special Drain. Dist.

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FRANK L. TOMLINSON and BEACH, HODNETT & TRAPP,  
for appellant.

HUMPHREY & ANDERSON and BLINN & COVEY, for ap-  
pellée.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion  
of the court.

The Broadwell Special Drainage District filed its bill in the Circuit Court of Logan county against Arthur Lawrence praying for an injunction restraining Lawrence from draining waters from land belonging to him into or upon lands lying within the boundaries of the district. Lawrence filed an answer to the bill of complaint, the cause was referred to the master in chancery, who took the evidence in the cause and reported the same to the court. The court heard the case upon the evidence so reported, and rendered a decree in favor of the drainage district, ordered Lawrence to disconnect a drain he had theretofore constructed, and perpetually enjoined him from running any water from the premises in question upon the lands of the drainage district. From this decree Lawrence has taken an appeal.

It appears from the evidence that the drainage district was organized in 1884; that the territory of the drainage district lies to the north and east of the land in dispute and includes lands of the appellant, which lie immediately north of and adjoin such disputed tract, which is the south half of the southeast quarter of section two, township eighteen, range three; that the drainage district established a system of drainage the main tile or ditch of which runs from a point about one and one-half miles east of appellant's land, in a general northwesterly direction, and that such ditch or tile is in what was the bed or depression of a natural waterway or slough. It also appears from the evidence that there is another bed or depression called the Lawrence slough lying on the south of the one

already described, which runs nearly parallel with it, the general fall of which is from the southeast to the northwest, the same as that in the organized district. The Lawrence slough, so lying to the south of the drainage district, crosses the disputed eighty-acre tract and in a state of nature would seem to have carried off toward the northwest waters coming upon that tract from quite a large area of land lying to the southeast thereof, belonging to persons other than Lawrence.

There was considerable conflict in the evidence as to the character of the Lawrence slough, *i. e.*, as to which way the water flowed in a state of nature. Some witnesses testified that the water naturally flowed from the disputed tract to the north and upon the lands of appellant which are in the drainage district, while others said the natural flow was to the northwest into a watercourse, at a bridge about a mile away.

A consideration of the whole evidence shows that while in case of a freshet or extreme high water, a part of the water may have gone to the north from the disputed tract, yet there was a general fall or descent to the northwest and that, except in cases of freshet, the water so far as it passed off at all went in that direction, and did not pass over the lands of appellant into the slough or swale embraced in the drainage district. The levels as given by the surveyors seem to support the theory that there was a general fall to the northwest and that from the east line of the eighty-acre tract in dispute to the west line along the north side thereof there was a very appreciable fall to the west. It furthermore appears from the evidence that in the year 1874, when the lands in the vicinity of the disputed tract were in a state of nature that the owners thereof dug a ditch beginning some distance southeast of the disputed tract, running thence northwest-  
erly to about the northeast corner of said tract and thence westerly and northwesterly to the bridge hereto-

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fore spoken of. When dug the earth was thrown out to the north and formed what some of the witnesses called a dyke about two and one-half feet above the surface. This ditch has been maintained ever since as a watercourse, *i. e.*, for a period of over thirty years prior to the time this proceeding was instituted.

It would seem that the construction of such ditch and its maintenance for such a length of time would be very suggestive, if not conclusive, evidence that the drainage of the lands lying in the Lawrence slough was towards the bridge rather than to the north and into the ditch of appellee, as now claimed by appellant.

It also appears from the evidence that the Lawrence slough was quite low and marshy, was from 200 to 300 (yards) wide, had its head over a mile in a south-easterly direction from the disputed tract, that in a state of nature and its condition as improved by the digging of the ditch in 1874, the waters of said slough, whether confined in said ditch or whether allowed to spread out in a course of nature, drained from the premises other than those of appellant upon and over the disputed tract.

The evidence further shows that some time in the year 1904, appellant laid about 1,000 feet of tile in the disputed tract and south of the said ditch and dyke described, and from it laid a tile to the north *under the ditch and dyke* to connect said disputed tract with the drain of appellee and by that means carried the water which fell on said south eighty, or came thereon, from the lands of his neighbors southeast thereof, into the drain of appellee. This tile the court ordered disconnected, and restrained appellant from maintaining the same at a distance of less than one hundred feet to the north of said ditch and dyke.

The court in its decree upon such evidence found that large quantities of water, not falling upon the disputed tract and which did not fall upon any land of appellant, were unlawfully diverted from their

proper course in said Lawrence slough and in said open ditch into said tile drain so laid by appellant and by that means into the ditch or drain of appellee.

This finding of the court would seem to have been warranted by the evidence. The tile as laid below the bed of the old ditch could not have failed, as testified to by several witnesses, to take a very large portion, if not all, of the water in said Lawrence slough ditch into the drain of appellee. It would also tend to drain a large territory south of said ditch in the slough. In either event it would drain or carry off the waters falling upon the lands of others beside appellant, into the drain of appellee.

Appellant contends that under section 42 of the Drainage Act of 1885, which provides that owners of land outside the drainage district may connect with the ditches of the district already made by payment, etc., and that if individual landowners outside of the district shall so connect they shall be deemed to have voluntarily applied to be included in the district, he had a right to connect his disputed eighty acres by means of the tile employed. Such section however does not permit an owner of an outside tract to connect with the drain of a district already made, where, as in this case, it diverts into the district, drainage of lands belonging to others, who have taken no action in the matter and are not made to assume any of the burdens of the district. *Dayton v. Drainage Commissioners*, 128 Ill. 271. The construction of said section 42 announced in the Dayton case is not modified in the case of *The People v. Drainage District*, 191 Ill. 623, cited by appellant. The latter case deals merely with the right or power of the commissioners to declare that landowners have elected to join a district; the holding being that an owner must himself do some act by which it can be said that he has voluntarily connected his land with the district.

Appellant also contends that the court was in error in restraining him from laying his tile within one hun-

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dred feet from the north of said old ditch and argues that the effect of such order was to deprive him of the benefits of the Drainage Act. We do not think, however, that the action of the court was erroneous in this respect.

There was evidence which fairly showed that the tile of the size used by appellant and laid as this tile was laid, would drain lands of the character of those involved for fully one hundred feet from the tile itself. There is no exact basis for such a determination, it must largely depend upon estimates to be given by men experienced in that line of work. From all the facts and circumstances before the court and in view of the fact that it was right to restrain appellant from so laying his tile that he would drain the waters from the ditch and from the lands south of it into the drain of appellee, we do not think the court's action in this regard was unwarranted.

Appellant has discussed other matters in his brief, but we do not care to extend this opinion by reviewing them, as the decree seems right and to have been fully sustained by the evidence.

The decree is affirmed.

*Affirmed.*

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### Federal Life Insurance Company v. Honora Flanigan.

**INSURANCE—effect of incontestable clause.** An incontestable clause contained in an insurance policy precludes the company from relying upon the fraud of the applicant as a ground of defense.

**Assumpsit.** Appeal from the Circuit Court of Vermilion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

C. A. ATKINSON and DYER & WALLBRIDGE, for appellant.

C. M. BRIGGS, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Honora Flanigan brought suit in the Circuit Court of Vermilion county against the Federal Life Insurance Company upon a policy of insurance issued by said company upon the life of James Flanigan, husband of said Honora, to recover the amount due her as beneficiary. There was a judgment in favor of Honora Flanigan for the amount named in the policy and interest, from which the insurance company has prosecuted an appeal.

The declaration set up in substance that on the eighth day of November, 1901, said appellant, for a good and valuable consideration, issued its policy of insurance in favor of appellee upon the life of James Flanigan in and by the terms of which it agreed to pay, at the death of said James Flanigan, to the said appellee, the sum of \$1,000, on satisfactory proof being made of the death of the said James; that all premiums due upon said policy had been paid prior to the time of the death of the insured and all terms and conditions of the policy complied with; that said James Flanigan died on the sixth day of April, 1905, and that proof thereof was made on the twenty-second day of the same month.

Appellant filed seven special pleas which set up the following defense, in substance, that James Flanigan, the assured, in his application, knowingly and fraudulently concealed from appellant that his father, mother and other relatives had died of consumption, and that he, himself, had had hemorrhages of the lungs shortly prior to the time of the issuing of the policy of insurance; that such concealment was for the purpose of fraudulently procuring from appellant the said policy of insurance and that appellant relied upon said statements so made by the said assured as being

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true in every respect and that the policy was therefore not enforceable against appellant.

To these pleas appellee filed a replication in which she charged that the policy of insurance had in it an "incontestability" clause in the words following: "This policy shall be contestable after one year from the date of issue for the amount due, provided the premiums are fully paid," and that a period of more than one year had expired after the issuing of the policy before the death of the insured and that all premiums had been duly paid as specified, and that by reason thereof appellant was barred from pleading the matters in said pleas set forth. To this replication a demurrer was filed by appellant, which was overruled by the court and thereupon appellant elected to abide by its demurrer, whereupon the court entered judgment.

Only one question is presented for our determination and that is whether or not the "incontestability" clause is a bar to appellant's setting up fraud as stated in the pleas.

We do not regard the question as an open one in this state but one that has been fully settled in the case of Royal Circle v. Achterrath, 204 Ill. 549-559, where the court say: "Stipulations to the effect that the policy or certificate shall become contestable for fraud in procuring the same after a lapse of a specified period from the date of its issue have been held valid as creating a short statute of limitations in favor of the insured and as giving the insurer a limited period for the purpose of testing the validity of the policy."

In such cases the company or association cannot set up fraud as a defense, if the period so fixed is sufficient to enable the company or association, by the exercise of proper diligence to ascertain whether fraud has been practiced or not. Such clauses making a policy or certificate contestable for fraud have fixed such period at from one to three years from the date

of the issuance of the policy or certificate," citing many cases in support thereof. There was no error in overruling appellant's demurrer and the judgment is affirmed.

*Affirmed.*

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**Springfield Consolidated Railway Company v. Fannie Wright.**

1. **VERDICT—when not disturbed as against the evidence.** A verdict will not be set aside as against the weight of the evidence unless the conclusion of the jury is manifestly against the weight of such evidence.

2. **VERDICT—when excessive.** In an action on the case for personal injuries, a verdict of \$1,425 is excessive where it appears that the injury in question was not serious, confined the plaintiff to her bed for about two weeks and was cured to a marked extent at the time of the trial, which occurred one year after the accident.

3. **PREPONDERANCE OF EVIDENCE—what does not constitute.** The mere fact that the plaintiff's theory is supported by the testimony of but one witness and that of the defendant by two, does not necessarily establish a preponderance of evidence in favor of the defendant; the jury may believe the one and disbelieve the two.

Action in case for personal injuries. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed upon *remittitur*. Opinion filed June 1, 1907.

WILSON, WARREN & CHILD, for appellant.

SHUTT, GRAHAM & GRAHAM, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Fannie Wright sued the Springfield Consolidated Railway Company in the Circuit Court of Sangamon county to recover damages, alleged to have been sustained by her through the negligence of the railway company's servants in the management of one of its street cars, while she was in the act of alighting from

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the car. There was a verdict in favor of Wright and against the railway company in the sum of \$1,425, upon which the trial court rendered judgment. The company appealed.

Appellant contends that the verdict of the jury was against the manifest weight of the evidence and that the trial court committed error in not setting it aside.

There were only three witnesses to the accident; they were appellee, the conductor upon the street car, and one Mary Coleman. Appellee testified that the car gave a sudden jerk just as she was stepping from the car which threw her to the ground causing the injury, while the conductor testified that appellee attempted to leave the car while it was in motion. The testimony of Coleman tends slightly to corroborate the conductor, yet it is so indifferent in character that it is of little value. She does not remember where appellee stood at the time of the injury, whether upon the platform or the step of the car, nor which way she was facing when she left the car and is not sure whether appellee got off the car before or after it stopped. The testimony of appellee and that of the conductor is in direct conflict, as to the way in which the injury was occasioned and as to appellee's exercise of due care.

In cases where the evidence is close and conflicting, and the determination of the rights of the parties depends solely upon the credibility of witnesses and the weight to be given to their testimony, this court is not disposed to interfere upon the ground alone that the verdict is manifestly against the weight of the evidence. Springfield Consolidated Railway Co. v. Lane, 116 Ill. App. 517. It has been frequently held that a reviewing court will not interfere with a verdict although such court might have arrived at a different conclusion upon the evidence. Bourke v. Anglo-American Provision Co., 90 Ill. App. 225; Lowe v. Ravens, 21 Ill. App. 630. Nor will the mere fact that the plaintiff's theory is supported by the testimony of but one witness and that of defendant's by two, establish the

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preponderance in favor of the defendant, as the jury may believe the one and disbelieve the two. Chicago Union Traction Co. v. O'Donnell, 113 Ill. App. 259.

It was the province of the jury to say to which witness or witnesses they would give credit and what one or ones they would disbelieve. We cannot say upon this record that the verdict of the jury was manifestly against the weight of the evidence and decline to interfere with the verdict upon that ground.

We hold, however, that the damages awarded by the jury to appellee are excessive. The evidence shows that appellee was not seriously injured and was confined to her bed only about two weeks; that her injury was cured to a marked extent at the time of the trial, about one year after the accident. We require appellee to remit \$425 of the judgment for \$1,425 leaving the amount of recovery at \$1,000. If appellee or her attorney will file such *remittitur* in this court within thirty days from the time this opinion is filed the judgment will be affirmed in the sum of \$1,000. Otherwise the judgment will stand reversed and the cause remanded.

*Affirmed on remittitur. Remittitur filed and judgment affirmed.*

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#### American Home Circle v. Fritz Schneider, Jr.

1. AMENDMENT—*what within power of court to allow.* It is within the discretion of the court to allow an amendment which consists of the dismissal out of the case of part of the plaintiffs originally joined in the action.

2. AMENDMENT—*what waives right to object to.* The right to object to the allowance of an amendment to a declaration is waived by pleading thereto.

3. VERDICT—*when not disturbed as against the evidence.* A verdict will not be set aside as against the evidence unless the conclusion of the jury is manifestly against the weight of such evidence.

4. CROSS-EXAMINATION—*when not error to exclude documentary*

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evidence. Documentary evidence subsequently admitted is not erroneously excluded during cross-examination.

5. INSTRUCTIONS—*must not submit questions of law.* Instructions are properly refused which leave to the jury the determination of questions of law.

6. INSTRUCTIONS—*must be predicated upon the pleadings.* Instructions which permit the jury to consider defenses not set up in pleadings are properly refused.

7. SUICIDE—*what instruction, upon burden of proof to establish, proper.* In an action upon an insurance policy where the defense interposed is that of suicide, it is proper to tell the jury that the burden of proof is upon the insurance company to show that the assured came to his death by his own hands, and that in the absence of proof of the cause of death, natural or accidental causes would be presumed.

8. NEWLY DISCOVERED EVIDENCE—*when not ground for new trial.* Newly discovered evidence which is cumulative and not clearly conclusive in its character, is not ground for new trial.

Assumpsit. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

GEORGE W. KENNEY, for appellant.

EDWARD D. HENRY and ROBERT H. PATTON, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

This is an action first brought by Fritz Schneider, Jr., Dora Schneider and Minnie Fromm, in the Circuit Court of Sangamon county, against the American Home Circle, a fraternal insurance order, to recover amounts alleged to be due them severally from said Home Circle upon a policy of insurance upon the life of Fritz Schneider, father of said Fritz, Jr., Dora and Minnie. Pending the trial the suit was dismissed as to said Dora Schneider and Minnie Fromm and thereafter a trial was had before a jury upon the claim of Fritz Schneider alone. A verdict was returned in his favor in the sum of \$1,000, a *remittitur* entered as to \$373.80 and judgment rendered for the sum of \$626.20,

from which judgment the American Home Circle has appealed.

Appellant first contends that there was error in allowing part of the plaintiffs in the original suit to be dismissed out of the case and in proceeding thereafter in the name of Fritz Schneider, Jr., alone. In this there was no error. The revised statutes allow amendments in pleading or proceeding either in form or substance for the furtherance of justice. In the case of *Kanawha Dispatch v. Fish*, 219 Ill. 236-241, the court say, citing *Teutonia Life Ins. Co. v. Mueller*, 77 Ill. 22, that "under our liberal statute of amendments there may be an entire change of plaintiffs when necessary."

Appellant argues, however, that by the change or amendment there was a cause of action stated different from that made in the first declaration and that the statute governing amendments does not contemplate such change. There is no force in the distinction sought to be made by appellant between allowing an entire change of parties and a statement of a different cause of action, except in those cases where the Statute of Limitations might be invoked to defeat a recovery, when an entirely new or different cause of action is stated for the first time in an amended declaration, after the statute has ripened into a defense.

Furthermore appellant filed a plea of the general issue and five other pleas and is not now in position to urge the alleged error relating to such amendment. *Upham & Gordon v. Richey*, 61 Ill. App. 650.

Appellant next urges that appellee should not have been allowed to recover for the reason that the contract of insurance, which consisted of the application for membership, the constitution, rules and laws of the order, provided that if the health of the insured became impaired by the use of narcotics, or if his death came by his own hand, whether he be sane or insane, there would be no liability upon the part of appellant.

There was no testimony in the case which would have

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warranted the jury in finding that the health of deceased had been in any way impaired by the use of narcotics and no claim was made at all that he was insane. The question then became this, did Fritz Schneider commit suicide? Knights Templars Indemnity Co. v. Crayton, 209 Ill. 550-557.

Upon this subject the evidence was close and conflicting and the issue was one of fact alone and one solely for the consideration of the jury. There was evidence tending to show that deceased came to his death from the effects of laudanum administered by himself; but many circumstances, and much of the testimony, tended so strongly to dispute the theory of suicide that we do not feel disposed to hold that the verdict was manifestly against the weight of the evidence.

Appellant next contends that the trial court committed error in not allowing it to put in evidence a certified copy of the verdict of the coroner's jury while appellee was being cross-examined. Even if this was error, which we do not admit, we do not see how appellant could have been prejudiced by such action of the court. Appellant offered such copy at another stage of the trial while appellant was making its defense and it was admitted as evidence and read to the jury, so that appellant had the benefit of the evidence for what it was worth, as well as though admitted at the time when first offered.

Appellant next urges that there was error in the action of the trial court in refusing appellant's third, fourth, fifth and sixth instructions and in giving appellee's fourth instruction. There was no error in this respect. Said four refused instructions offered by appellant made the jury the judges of the law and submitted to such jury issues not presented by the pleadings in the case. Under such instructions the jury were told that if they believed from the evidence that deceased had been guilty of a breach of any provision of the application, certificate, constitution, or

by-laws, of appellant, they should find a verdict for defendant, without regard to whether a breach of such provision had been made a subject-matter of defense by appellant's pleas, and without regard to the materiality of such provision.

Appellee's fourth instruction was properly given. It in effect told the jury that the burden of proof was upon appellant to show that the assured came to his death by his own hands, and that in the absence of proof of the cause of death, natural or accidental causes would be presumed. This instruction stated a correct proposition of law and was properly given. *Knights Templars Indemnity Co. v. Crayton, supra.*

Appellant next urges that the trial court committed error in refusing a new trial for the reason, among others, that appellant had discovered new and material testimony after the trial of the cause and before the motion for new trial was argued, and engages in a lengthy and very learned discussion of the character of cumulative evidence. Upon a careful consideration of the affidavits presented we are constrained to hold that the newly discovered evidence was cumulative in its character and not conclusive.

"Newly discovered evidence, on a motion for new trial, must be clearly conclusive in its character to require the court to grant a new trial." *Henry v. The People, 198 Ill. 162-199; Durant v. Rogers, 87 Ill. 508-512.*

There is no reversible error in this record and the judgment is affirmed.

*Affirmed,*

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#### American Home Circle v. Dora Schneider.

This case is controlled by the decision in *American Home Circle v. Schneider, ante, p. 600.*

Assumpsit. Appeal from the Circuit Court of Sangamon county;

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American Home Circle v. Fromm.

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the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

GEORGE W. KENNEY, for appellant.

EDWARD D. HENRY and ROBERT H. PATTON, for appellee.

PER CURIAM. The questions in this case (except one relating to amendments which is not involved here) are identical with those discussed in the case of American Home Circle v. Fritz Schneider, Jr., *ante*, p. 600.

The holdings announced in that case are decisive of this case and the judgment in favor of appellee against appellant, in the sum of \$500, is affirmed.

*Affirmed.*

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American Home Circle v. Minnie Fromm et al.

This case is controlled by the decision in American Home Circle v. Schneider, *ante*, p. 600.

Assumpsit. Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

GEORGE W. KENNEY, for appellant.

EDWARD D. HENRY and ROBERT H. PATTON, for appellee.

PER CURIAM. The questions in this case (except one relating to amendments, which is not involved here) are identical with those discussed in the case of American Home Circle v. Fritz Schneider, Jr., decided at this term of this court, *ante*, p. 600.

The holdings announced in that case are decisive of this case and the judgment in favor of appellee against appellant in the sum of \$500 is affirmed.

*Affirmed.*

Toledo, St. Louis & Western Railroad Company v. Albert I. Ferguson.

1. **MEASURE OF DAMAGES**—when *application of erroneous, not ground for reversal*. Notwithstanding the measure of damages applied by the court to a cause is not the true one, a reversal will not follow where the verdict was not more than was justified by the evidence.

2. **ATTORNEY'S FEES**—when *erroneous instruction as to amount allowable not ground for reversal*. An instruction which fails to limit the jury to the evidence as the basis for the allowance of an attorney's fee, though erroneous, is not ground for reversal where the amount allowed was reasonable and justified by the evidence.

Action commenced before justice of the peace. Appeal from the Circuit Court of Coles county; the Hon. JAMES W. CRAIG, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

CHARLES A. SCHMETTAU, EUGENE RHEINFRANK, and A. J. FRYER, for plaintiff in error; CLARENCE BROWN, of counsel.

HENLEY & HUGHES, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Albert I. Ferguson brought suit against the Toledo, St. Louis & Western Railroad Company before a justice of the peace to recover for damages resulting to his property from the setting of fire, by locomotives of the railroad company. He recovered a judgment before such justice of the peace from which the railroad company appealed to the Circuit Court of said Coles county. The case was again tried in the latter court where Ferguson recovered a verdict and judgment in the sum of \$65. The railroad company has appealed.

It appears from the evidence that there were three fires set by the locomotives of appellant which damaged appellee's property on the dates respectively, Septem-

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ber 24, 1905, September 29, 1905, and October 16, 1905; the first of which damaged a small field of clover; the second damaged an oat stubble in which there was a stand of growing clover and also burned about twenty-two rods of fence; the third destroyed appellee's clover and timothy meadow.

There was ample evidence given in the case by appellee and his witnesses to show that he sustained a direct loss from such fires in the sum of \$37 and that the services of his attorney in trying the case before the justice of the peace and again in the Circuit Court were reasonably worth from \$35 to \$40. Appellant offered no evidence whatever upon either branch of the case and it would seem that the verdict of the jury in fixing the damages at \$65 was a fair and moderate one.

Appellant seeks a reversal of the judgment upon the ground that the court admitted evidence as to the value of the fence and crops destroyed, and did not limit appellee, either in the giving of testimony or by instructions, to the rule that in case of damage to meadows, growing crops, etc., resulting from fire escaping from a locomotive, the measure of damages is the difference between the value of the land upon which such crops were situated before and after the fire complained of.

The rule contended for by appellant is the correct one and is one which the trial court should have enforced, yet we do not regard the error as one so far prejudicial as to warrant us in reversing the judgment.

Appellant by its passing locomotives set three fires to the property of appellee within a period of twenty-two days and the trial court permitted witnesses for appellee to state the amount of damage done, to the specific thing burned or destroyed by each of the separate fires, instead of holding appellee to the correct rule as announced. If it appeared that any injury to appellant's case had resulted from such ruling of

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the court we would be disposed to reverse the judgment; but such is not the case. Appellant does not contend that the damages allowed were excessive and upon the trial offered no evidence whatever, either to dispute the testimony given by appellee and his witnesses, or to show that the damages as estimated by the correct rule were less than the damages as fixed by the evidence of appellee.

It is clearly apparent from this record that appellee recovered from appellant no more than he was entitled to and we are not disposed to reverse the judgment in order that appellee may accomplish the same result by a different means when the means that have been employed worked no harm to appellant.

Appellant contends that there was error in the court's instructing the jury that appellee could recover "such a reasonable amount of attorney's fees as they might believe from the evidence he was entitled to," and argue that by force of such instruction the jurors were allowed to exercise their individual judgment in determining how much appellee was entitled to recover upon that account. Conceding that this instruction was faulty in not requiring the jury to fix the reasonable value of the services of the attorney *as shown by the evidence*, yet it cannot be said to have done appellant any harm for the reason that the jury in their estimate allowed appellee only \$65, including attorney's fees, while the undisputed evidence showed that his direct damages were \$37 and his attorney's fees at least \$35, making a total of \$7 more than the jury allowed.

The judgment was right and is affirmed.

*Affirmed.*

Appellee's motion to tax against appellant the cost of additional abstract furnished by appellee is allowed.

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Bergstrasser v. The People.

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**Henry Bergstrasser et al. v. The People of the State of Illinois.**

1. INFORMATION—*power of court to permit amendment of.* Informations, unlike indictments, may be amended and it is within the discretion of the court to determine the propriety of permitting the same.

2. INFORMATION—*when locus quo need not be proven, as laid.* The *locus quo* of an offense need not be proven precisely as laid, where the place of the commission of the offense was not material thereto.

3. INFORMATION—*when judgment entered in prosecution instituted by, proper.* A judgment in a prosecution commenced by information which is against the defendants and “each of them” is a several judgment and is free from formal error.

4. STATE'S ATTORNEY—*when not error to refuse to permit showing as to who employed assistants for.* Where a state's attorney is assisted by outside counsel, it is not error to refuse to permit the defendant to show who employed and paid such outside counsel, where no objection to their participation was made.

Criminal prosecution for keeping slot machine. Error to the County Court of Adams county; the Hon. C. B. McCROBY, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**JOHN T. GILMER, for plaintiffs in error.**

**WILLIAM B. SHEETS and H. B. COFFIELD, for defendants in error; WILLIAM SCHLAGENHAUF and H. E. SCHMIEDESKAMP, of counsel.**

**MR. PRESIDING JUSTICE RAMSAY** delivered the opinion of the court.

Henry Bergstrasser and John E. Dick were convicted in the County Court of Adams county upon an information charging them with unlawfully keeping a slot machine in their saloon in the city of Quincy, the same being a device upon the result of the action of which money was staked and hazarded. The court imposed a fine of \$100 upon Bergstrasser and Dick and they sued out a writ of error.

Information against plaintiffs in error was filed in the County Court of Adams county by William B. Sheets as state's attorney, on the eighth day of February, 1906, charging said plaintiffs in error with keeping a slot machine in their saloon in Quincy, the same then and there being a device upon the result of which money was staked and hazarded contrary to law. On the twenty-third day of that month and before plaintiffs in error filed any plea, the court allowed the information to be amended so that it charged that the device was one upon the result "*of the action*" of which money was staked, the words quoted being inserted by amendment.

Plaintiffs in error contend that the action of the court in allowing amendment to the information was prejudicial error. We hold the amendment was properly allowed. "In matters of amendments, informations stand on entirely different grounds from indictments. The public officer by whom the information is presented being always present in court, it may be amended, on his application, to any extent which the judge deems to be consistent with the orderly conduct of judicial business, with the public interest, and with private rights." Long v. The People, 135 Ill. 435-441; Truitt v. The People, 88 Ill. 518.

Plaintiffs in error next contend that the verdict should have been set aside because the information charged that the slot machine was kept at "532 Main street in the city of Quincy," while the evidence showed that such machine was kept in the saloon of plaintiffs in error in said city without the street or number being fixed.

If the act complained of in the information had been unlawful in one place and lawful in another, then its exact location would have had to be charged and proven, as was declared in State v. Turnbull, 78 Me. 395, and Commonwealth v. Heffron, 102 Mass. 150, cited by plaintiffs in error, but where the offense charged in the information consists in doing some-

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thing which is unlawful at any place, then it is not necessary to charge or prove the exact place where the act was committed, if committed within the jurisdiction of the court.

In Durham v. The People, 4 Scam. 172, the court say: "In stating the name of the prosecutor or person on whom the offense was committed, certainty to the common intent only is necessary. The name by which he is usually known is sufficient without stating his residence. If this be stated it may be regarded as a superfluous averment and need not be proved. Whenever a description or averment can be stricken out without affecting the charge against the prisoner, and without vitiating the indictment, it may be treated as surplusage and rejected." This case is cited with approval in Sutton v. The People, 145 Ill. 286.

Plaintiffs in error also contend that the judgment entered was not in proper form, and that the trial court wrongfully refused to allow plaintiffs in error to prove that person or persons had employed the attorneys other than the state's attorney, who assisted in the trial of the cause upon the part of the People. Upon the first of these contentions it is enough to say that the judgment rendered was against the plaintiffs in error and "each of them," and was therefore several and not joint, and in that form was sufficient. Upon the other of such contentions the record does not disclose that any objection was made to the state's attorney having an assistant in the case and no injury resulted to plaintiffs in error because they were not allowed to show who paid the assistants for their services.

The evidence shows that plaintiffs in error were saloon keepers in Quincy; that they kept in their saloon what is commonly called a slot machine which was so arranged that nickels were deposited in the slot, a lever pulled and cards thereby thrown in line by means of which it was determined what, if anything, the player would take for his money deposited; that

the machine was in February, 1906, operated, money deposited and beer or chips won. Upon this showing the fine was rightfully imposed. There is no error in this record and the judgment is affirmed.

*Affirmed.*

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**James E. Osborne v. John H. Culver.**

1. **USURY—when action lies to recover.** Where a note containing an usurious charge is assigned before maturity to an innocent holder for value and is paid by the maker, the maker may sue the original holder at law and recover such usurious charge.

2. **CHANCELLOR—when finding of fact by, not disturbed.** Where a master in chancery and a chancellor have heard the evidence, their findings will not be disturbed where the evidence is close and the reviewing court has a well-founded doubt as to how the question should have been decided.

Bill in equity. Appeal from the Circuit Court of Macon county; the Hon. J. W. CRAIG, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

DICKINSON & LEE, for appellant.

C. E. SCHROLL, for appellee.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

John H. Culver brought suit in equity in the Circuit Court of Macon county against James E. Osborne, to recover usury alleged to have been paid by Culver to Osborne. There was a decree in favor of Culver in the sum of \$1,173.14, from which Osborne has appealed.

It appears from the master's report that in January, 1892, appellee borrowed from appellant the sum of \$300, and that the loan was continued in different forms until the twenty-fifth day of May, 1896, when Culver gave to appellant a new note for \$882, which

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was assigned by appellant to his brother, Martin L. Osborne, before maturity; that suit at law was brought by Martin L. Osborne against appellee upon said assigned note upon which judgment was rendered against Culver in the sum of \$1,173.14, and that appellee had paid the judgment in full.

Appellant first contends that where usury has been paid, no suit can be maintained for its return or recovery.

It is true that where usury has been voluntarily paid, no suit can be maintained for its return, but where, as in this case, one who takes a note in which usury is embraced transfers such note before maturity to an innocent purchaser so that the defense of usury is cut off, payment by the maker of the note to such *bona fide* purchaser will be regarded as compulsory and not voluntary, in which event courts of equity will lend their aid to recover back the usury paid by the borrower. *Wordsworth et al. v. Huntoon et al.*, 40 Ill. 131; *Pearce v. Martin*, 130 Ill. App. 24.

Appellant next contends that the evidence does not support the finding that there was usury involved in the dealings between appellee and appellant.

Both the master in chancery and the chancellor who heard the case, determined and held that the loan involved was usurious. In cases where the evidence is close and the reviewing court has a well-founded doubt as to how the question should have been decided, the finding of the trial court should not be disturbed. *McCormick v. Miller et al.*, 102 Ill. 208; *Greensfelder v. Corbett*, 190 Ill. 565. We do not rest our determination of this case solely upon that rule, however, for a careful consideration of all the evidence satisfies us that the loans involved were at usurious rates and that the chancellor was fully warranted in rendering the decree in favor of appellee.

The decree was right and is affirmed.

*Affirmed.*

**Acorn Brass Manufacturing Company v. James Gilmore.**

This case is controlled by the decision in *People v. Severson*, 113 Ill. App. 296, and in *Meyer v. City of Decatur*, *ante*, p. 385.

**Assumpsit.** Error to the Circuit Court of Vermilion county; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1906. Writ dismissed. Opinion filed June 1, 1907.

**WINKLER, BAKER, THOMPSON & HOLDER,** for plaintiff in error.

**R. ALLAN STEPHENS and SWALLOW & SWALLOW,** for defendant in error.

**MR. PRESIDING JUSTICE RAMSAY** delivered the opinion of the court.

The Acorn Brass Manufacturing Company began suit in the Circuit Court of Vermilion county against James Gilmore, and filed its declaration to which the trial court sustained a demurrer. Plaintiff in error elected to abide by its declaration whereupon the court made the following order: "It is therefore ordered and adjudged by the court that said defendant have and recover of and from said plaintiff his costs and charges herein expended and have execution therefor."

The judgment so entered was interlocutory and not final.

This question was determined in *People, for use of Phillips, v. Severson*, 113 Ill. App. 496, and in *Meyer v. City of Decatur*, *ante*, p. 385, where an order in language almost identical with that above employed, was under consideration. The judgment appealed from not being final, the writ of error must be dismissed for want of jurisdiction, with leave to plaintiff in error to withdraw the record, and to either party to move for final judgment in the Circuit Court.

The writ of error is dismissed.

*Writ dismissed.*

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Litchfield & Madison Ry. Co. v. Shuler.

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**Litchfield and Madison Railway Company v. Terry M. Shuler, Administratrix.**

1. **INSTRUCTIONS**—*must be predicated upon the evidence.* Instructions are erroneous which are not predicated upon any evidence in the cause.

2. **DAMAGES**—*what evidence not competent upon, in action for death caused by alleged wrongful act.* In an action for death caused by alleged wrongful act, it is not competent to permit the administratrix, who was the widow of the intestate, to show that she and her minor child were dependent upon the intestate for support at the time of the injury which resulted in death.

3. **RELEASE**—*what does not show fraud in procurement of.* Mere incapacity to appreciate and understand the act of executing a release does not render it void and will not establish, of itself, the contention of fraud in procurement.

4. **RELEASE**—*when return of consideration for, essential to avoid.* Where it is sought to meet a plea of release interposed in an action on the case and it is shown that the release was not void for fraud but merely voidable for incapacity, it is essential in order to remove the bar of the release either to show a return of the consideration paid therefor or an offer to return such consideration.

Action in case for death caused by alleged wrongful act. Appeal from the City Court of Litchfield; the Hon. PAUL McWILLIAMS, Judge, presiding. Heard in this court at the November term, 1906. Reversed and remanded. Opinion filed June 1, 1907.

WILSON, WARREN & CHILD, and BELL & BURTON, for appellant.

HARRY C. STUTTLE and LANE & COOPER, for appellee; EDWARD C. KNOTTS, of counsel.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

J. H. Shuler, an employe of the C., B. & Q. Railroad Company, was injured by the alleged negligence of the Litchfield & Madison Railway Company in the management of one of its cars upon the switch or side track of the C., B. & Q. Railroad Company, which injury resulted in Shuler's death. Terry M. Shuler,

widow of the deceased, was appointed administratrix of his estate and brought suit in the City Court of Litchfield against the Litchfield & Madison Railway Company, where she recovered a verdict in the sum of \$4,000. Judgment was rendered upon the verdict and this appeal followed.

It appears from the evidence that on the night of January 21, or early in the morning of January 22, 1906, deceased, while in the discharge of his duties as "hostler" for the C., B. & Q. Railroad Company at Litchfield, was injured by a car that was "kicked" in by appellant upon the switch track of the C., B. & Q. Railroad Company from which injuries he died in the hospital at Litchfield on the seventh of the following April. It also appears from the evidence that on the twelfth day of February, 1906, one Childs, an attorney for appellant, visited Shuler at the hospital when and where a release is alleged to have been obtained in full of all damages in consideration of the sum of \$1,000 paid to him in cash.

The questions presented upon this record are these: Did the evidence warrant the jury in finding appellant guilty of negligence; was deceased in the exercise of due care for his own safety; was there error in giving appellee's third instruction; was there error in allowing appellee to prove that she and her minor child were dependent upon deceased for their support at the time of the injury, and was there error in the ruling of the court upon the question of alleged fraud relating to the release made by deceased to appellant.

Upon the first of these contentions the evidence seems to establish that deceased was engaged in the discharge of his usual duties in and about the switch yards in Litchfield on a dark, rainy night or early morning; that he was on his way to an engine upon which he had some work to do; that the servants of appellant "kicked" a caboose in upon the side track on which Shuler was walking to his work; that the car was running at the rate of about ten miles per

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hour, was dimly lighted, if lighted at all; that no one was in charge of the car at the time and no warning of any kind was given of the approach of the car; that the car struck Shuler in the back, knocked him down and ran over him, inflicting such injuries that he died therefrom. Appellant offered no evidence to dispute this showing. The question of negligence upon the part of appellant was one of fact alone upon the evidence for the jury to determine, and their verdict in this respect seems to have been fully warranted.

Upon the subject of due care upon the part of deceased, appellant introduced testimony to the effect that Shuler, while in the hospital, said that he was at fault in the matter; that he turned around and saw the car coming, but thought it was on another track, so did not get out of the way; while upon the part of appellee there was evidence to the effect that Shuler's injuries were of a very severe and painful character; that there was a large hole in the top of his head; that his skull was crushed in, one leg above the foot was ground up and one hip crushed; that during the time between his injury and his death Shuler had to be strapped to his bed and bound down and was so irrational and crazy that his statements had no meaning and could throw no light upon the manner in which he received the injury. This issue thus became also one of fact alone for the jury and one which they were better qualified to decide than we are.

The third instruction given for appellee which was in the following words: "The court instructs the jury that if you further believe from the evidence that the release in question was obtained by fraud and circumvention, then and in that case the plaintiff would not have to offer or pay back to defendant the \$1,000 paid the deceased before bringing her suit, and you will so regard the law in making up your verdict," was misleading as there was no evidence in the case tending to show fraud of the character contemplated by the instruction. The fraud contemplated by the in-

struction is that which relates to obtaining the release, which means that there *was* a release and Shuler executed it, but that his signature thereto was obtained by unfair or fraudulent means. Such instruction could not have been intended to apply to a claim of forgery, as now argued by appellee, for the claim of forgery, if sustained by the evidence, would have avoided the release independently of any other question.

It was also error for the court to allow appellee to prove that she and her minor child were dependent upon deceased for support at the time of the injury, as under the statute the dependency, age, poverty or incapacity of those who may take the estate of deceased are not elements of damage. The action under the statute is brought for the benefit of the widow and next of kin, the damages to be distributed to such widow and next of kin in the same manner as personal property of intestates is distributed, and must be for pecuniary damages only. This question was elaborately discussed in C., P. & St. L. R. R. Co. v. Woolridge, 174 Ill. 330, where the court say that the poverty, wealth, helplessness, dependency of the lineal next of kin, their number and age, are immaterial matters on the question of the amount of recovery. In St. L., P. & N. Ry. Co. v. Rawley, 90 Ill. App. 657, the court say: "Under repeated rulings of the Supreme Court the damages to be recovered in an action of this kind by lineal descendants, is pecuniary damage only and that is not affected by the fact that the deceased supports his family or by the number of them supported. Introduction of evidence of this character tends to awaken the sympathy of the jurors for the bereaved and to warp their judgment upon the controlling issues in the case."

If it is right to prove that there is one dependent child then it would also be competent to show ten dependent children, if the facts would warrant it, which would in effect change the basis of estimating damages from one solely pecuniary, as contemplated by the stat-

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ute, to one involving the number of dependents who might survive the deceased.

As this case must be reversed for the reasons already stated and as the case will in all likelihood be tried again, it is right for the court to intimate its holdings upon the claim made by appellant that in order for appellee to recover it is essential that she offer to return the \$1,000 paid to Shuler by Childs at the time of the execution of the release.

Appellant offered in evidence a release dated February 12, 1906, purporting to be signed by deceased, by the terms of which, in consideration of the sum of \$1,000 paid, he released appellant from all claims he had against it for the injury he had sustained. Childs, attorney for appellant, as well as F. Bagby and John Weien, testified to the payment of the money by Childs to Shuler, and to the statements of Shuler to the effect that he had received the money. Thereupon appellee sought to show that from the time Shuler was hurt until his death and on the day the release was obtained, deceased did not have mental capacity enough to transact ordinary business, for the purpose, as it was claimed, of establishing fraud upon the part of appellant. Appellee's offer, however, did not amount to an offer to show fraud and the court properly so ruled. Mere incapacity of itself would not render the contract void but merely voidable in which event, an offer to return the money paid would be essential to a recovery.

If, however, deceased at the time of the making of the release was so mentally incompetent that he could not transact or understand the ordinary business affairs of life and Childs knew it, or if the then existing facts of which he should have taken notice were such as to charge him with knowledge of Shuler's condition, and with such knowledge, or charged therewith, he effected an unfair settlement with deceased, he would be guilty of fraud and no return of the money paid would be necessary in order to enable Shuler or his

representative to recover. *Clay v. Hammond*, 199 Ill. 370; *Ronan v. Bluhm*, 173 Ill. 277; *Morris v. Great Northern Ry. Co.*, 67 Minn. 74.

The case of *Pawnee Coal Co. v. Royce*, 184 Ill. 402, cited by appellant is not in conflict with the doctrine above announced. In the latter case the court seemed to recognize the doctrine just stated, saying that in order to excuse a return of the money paid upon the execution of a release of damages for a personal injury, actual or intended fraud must be made to appear.

It would be competent in establishing Shuler's incapacity to show his condition, both before and after the date of the release, but in order to charge Childs with fraud it must be shown that at the time of the signing of the release he had knowledge of such incapacity upon the part of Shuler, or that the then existing facts were such that he would be chargeable with notice thereof.

For the reasons above given, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

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#### Joe H. Fussell et al. v. J. B. Hall et al.

1. **RELIGIOUS DISPUTE—jurisdiction of courts with respect to.** The civil courts assume no right or power to settle disputes upon religious or ecclesiastical subjects, but follow the construction which the church courts put upon such matters.

2. **RELIGIOUS CORPORATIONS—power of church organization to unite.** It is within the inherent right of one church organization, corporately organized, to unite with another church organization of the same faith where such act of union is not in specific disregard of charter powers, and will, in the judgment of the governing body of the church seeking to form such union, tend to the general advancement, growth and prosperity of the united church.

3. **ENDOWMENTS—when not improperly affected by union of religious corporations.** Endowments made to a religious organization are not improperly affected by a union of such organization with an-

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other religious organization of the same faith unless the endowments in question expressly restrict or limit the grant so as to prohibit such a union.

Bill for injunction. Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the November term, 1906. Affirmed. Opinion filed June 1, 1907.

**Statement by the Court.** Joe H. Fussell, T. A. Havron, John W. Parker and others filed their bill for injunction in the Circuit Court of Macon county to restrain J. B. Hail and others, as commissioners to the general assembly of the Cumberland Presbyterian Church, from taking steps toward perfecting a union of the Cumberland Presbyterian Church with the Presbyterian Church of the United States of America. A demurrer was interposed to the bill and sustained by the trial court. Fussell et al. elected to stand by their bill, whereupon the prayer thereof was denied and the bill dismissed for want of equity at the costs of the complainants. Fussell et al. appealed.

It was alleged in the bill, in substance, that said Fussell, Havron, Parker et al. were members in good standing in, and communicants of the Cumberland Presbyterian Church; that they presented the bill for injunction for themselves and on behalf of all other members in good standing in said Cumberland Presbyterian Church, who were opposed to the reunion and union of the Cumberland Presbyterian Church with the Presbyterian Church of the United States of America, who numbered more than 100,000 persons; that the said Cumberland Presbyterian Church was organized as a separate church, independent of all other, on the fourth day of February, 1810, in Dixon county, Tennessee, and had always since that time continued its separate church organization; that the cause which, in 1810, led to the separation from the Presbyterian Church of the United States of America, was the doctrines of "election" and "reproba-

tion" as taught in the Westminster Confession of Faith of the Presbyterian Church of the United States of America, to which confession of faith the Cumberland Presbyterian Church had never subscribed, but upon the contrary held to such a modification of such confession of faith as to eliminate therefrom the doctrine of unconditional election and reprobation and limited atonement, further holding that there were and are no eternal reprobates, and that all infants dying in infancy are saved; that said Cumberland Presbyterian Church had congregations disseminated through Illinois, Iowa, Missouri, Kentucky, Tennessee and many other western states; that said religious society so composed was not incorporated under the laws of any state, but was governed by a constitution adopted in 1883, which had been followed and recognized throughout the entire denomination ever since it was so adopted; that the governmental affairs of the church were administered by and through church courts known as the church "session," "presbytery," "synod" and "general assembly"; that the session consisted of a minister and two, or more, ruling elders; a presbytery consisted of all the ordained ministers and one ruling elder from each church within a given district; a synod consisted of all the ministers and one ruling elder from each church in a district comprising at least three presbyteries; while the general assembly was the highest court of the church and represented in one body all the particular churches and exercised jurisdiction over such matters as concerned the whole church, and was made up of commissioners chosen from the presbyteries; that the defendants in the bill were also members of the said Cumberland Presbyterian Church and as such had been chosen as commissioners to the general assembly to meet at Decatur, Illinois, in May, 1906; that the said assembly so to meet at Decatur was the assembly and Decatur the place of meeting determined upon at the preceding meeting of the said general assembly held at Fresno,

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California, in 1905; that said assembly consisted of commissioners elected from their respective presbyteries; that the powers of said general assembly were fixed by said constitution in sec. 43, which reads as follows:

“43. The General Assembly shall have power to receive and decide all appeals, references, and complaints regularly brought before it from the inferior courts; to hear testimony against error in doctrine and immorality in practice, injuriously affecting the Church; to decide in all controversies respecting doctrine and discipline; to give its advice and instruction, in conformity with the government of the Church, in all cases submitted to it; to review the records of the Synods; to take care that the inferior courts observe the government of the Church; to redress whatever they may have done contrary to order; to concert measures for promoting the prosperity and enlargement of the Church; to create, divide, or dissolve Synods; to institute and superintend the agencies necessary in the general work of the Church; to appoint ministers to such labors as fall under its jurisdiction; to suppress schismatical contentions and disputations, according to the rules provided therefor; to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this Church; to authorize Synods and Presbyteries to exercise similar power in receiving bodies suited to become constituents of those courts, and lying within their geographical bounds respectively; to superintend the affairs of the whole Church; to correspond with other Churches; and, in general, to recommend measures for the promotion of charity, truth, and holiness throughout all the Churches under its care.”

It was further alleged in said bill that at the meeting of the general assembly held at Nashville, Tennessee, in 1903, a resolution was introduced and referred unanimously to the committee on overtures which provided that whereas there were before that body memorials praying the appointment of a com-

mittee to consider the advisability of a union of the Cumberland Presbyterian Church with the Presbyterian Church of the United States of America, which provided that there be appointed (and accordingly there was so appointed) a committee on Presbyterian Comity, Federation and Union, to consist of nine persons who shall do all in their power to promote closer organization and union of all branches of the Presbyterian family and report to the next general assembly; that said general assembly at Nashville, Tennessee, at its meeting in 1903, adopted a resolution that its committee of nine confer with such like committees as might be appointed by other Presbyterian bodies in regard to organization and union among members of the Presbyterian family.

It was further alleged in the bill that at the general assembly held at Dallas, Texas, in 1904, such committee so appointed reported that without any previous agreement, there was a feeling in both the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America, among individuals, presbyteries and synods, in favor of such movement after the publication of the action of the Presbyterian Church of the United States of America of its act of revision or declaratory statement of 1903; that expressions of a desire for union with the Presbyterian Church of the United States of America had been made by those in authority in the Cumberland Presbyterian Church in 1810, 1811, 1812, 1813, 1860, 1867, 1873, 1885 and 1888; that the revision or declaratory statement of 1903, made by the Presbyterian Church of the United States of America, had modified the declarations contained in the confession of faith as originally expressed and held by that Church, so the objections that had been before made to it by the Cumberland Presbyterian Church could no longer be successfully made; that in essentials the original confession of faith of the Presbyterian Church of the

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United States of America had been so far revised that it was the duty of the two churches to enter into a union; that this resolution was by unanimous vote made a special order of business, and a resolution adopted by a vote of 162 to 74 to submit the basis contained in the report of said committee, to the Presbyteries of the Cumberland Presbyterian Church in the usual constitutional manner, upon receiving official notification of the adoption of the said joint report by the general assembly of the Presbyterian Church of the United States of America; that said committee also further submitted a report upon such proposed union recommending that reunion or union of the two churches be accomplished as soon as the necessary steps could be taken upon the basis that the United Church be known as the Presbyterian Church of the United States of America, possessing all the legal and corporate rights and powers which the separate churches then possessed; that the union be effected on the doctrinal basis of the confession of faith of the Presbyterian Church of the United States of America as revised in 1903; that each of these assemblies should submit such basis of union to its presbyteries which should express their approval or disapproval thereof before April 30, 1905, in answer to the question, "Do you approve of the reunion and union of the Presbyterian Church of the United States of America and the Cumberland Presbyterian Church on the doctrinal basis of the confession of faith of the Presbyterian Church of the United States of America as revised in 1903, and of its other doctrinal and ecclesiastical standards?" that each presbytery should, by May 10, 1905, forward to the stated clerk of the assembly a statement of its vote on the said basis of union which should be submitted by such clerks to the general assemblies, and if the general assemblies should then find that the basis of union had been approved by the constitutional majority of the pres-

byteries connected with each branch of the church, then the same would be of binding force and both assemblies should take action accordingly; that all the ministers and churches in the two denominations should be admitted to the same standing in the united church which they may have held in their respective connections up to the consummation of the reunion; that the official records of the two churches during their period of separation should be preserved and held as making up the history of one church; that the permanent committees and boards should be so reconstructed as to represent with impartiality the views and wishes of the two bodies constituting the reunited church; that the institutions of learning, together with their endowments and other property, both real and personal, under the control of the Cumberland Presbyterian Church, should remain in charge of and be controlled by the board of trustees or other managers respectively in charge thereof, or by their successors similarly appointed or elected, so as to preserve the integrity of the institutions and maintain their then present policy.

In said bill it was further alleged that at Fresno, California, at the general assembly in 1905 of the Cumberland Presbyterian Church, there were submitted both a majority and minority report by the said committee on organic union; that the majority report stated that the special committee appointed to canvass the vote of the presbyteries upon the subject of union returned that sixty presbyteries had voted for approval of union of the two churches while fifty-one presbyteries had disapproved thereof, with two presbyteries not voting, in favor of the reunion and such majority report recommended that (whereas, the general assembly of each church had appointed a committee on reunion which said committees, after conferring together, had agreed upon a plan or basis of reunion and by joint report presented the same to their respective general assemblies in 1904, and had

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recommended adoption thereof, which had been adopted by the necessary vote, etc., in the Cumberland Presbyterian Church, and approved by the presbyteries in said church by a vote of sixty to fifty-one), a resolution be adopted to the effect that said reunion and union had been constitutionally agreed to by a majority of the presbyteries of the Cumberland Presbyterian Church and that the said basis of union had, for the purposes of the union, been constitutionally adopted; that at said meeting those in protest to said union offered a minority report in lieu of the majority report which minority report was defeated by a vote of 137 to 111; that upon the defeat of such minority report such general assembly at Fresno adopted a resolution adding nine new members to said committee on fraternity and union and instructed said committee so constituted (with its added members) to confer with the committee on co-operation and union of the Presbyterian Church of the United States of America with reference to adjusting details of union with the latter church.

In said bill it was charged that all reports of such committees so adopted were all and each of them without authority, *ultra vires* and void; that the general assembly, synods and presbyteries had exceeded their authority under the constitution; that the basis of union between said two churches as suggested was upon a doctrinal basis of the confession of faith of the Presbyterian Church of the United States of America, as revised in 1903, whereas the general assembly of the Presbyterian Church of the United States of America at its session in 1904, declared that "the assembly in connection with this whole subject of union with the Cumberland Presbyterian Church places on record its judgment that the revision of the confession of faith, effected in 1903, has not impaired the integrity of the system of doctrine contained in the confession taught in the

Scriptures; but was designed to remove misapprehension as to the interpretation thereof."

In said bill it was further alleged that the value of the property of the congregations of the Cumberland Presbyterian Church was over five million dollars, besides school and publishing house property, worth about two million more; that there were nearly three thousand churches and congregations in the Cumberland Presbyterian Church; that said general assembly, acting by and through said committee on fraternity and union, was attempting and threatening to consummate the alleged illegal and unconstitutional merger and absorption of the said Cumberland Presbyterian Church with the Presbyterian Church of the United States of America and report their action in that regard to the general assembly of the Cumberland Presbyterian Church at Decatur, Illinois, and perfect such reunion unless restrained, etc.

In said bill it was further alleged that the said property of the Cumberland Presbyterian Church, so valued at more than seven millions of dollars, was during a period of ninety-five years given to said Cumberland Presbyterian Church because of its particular teachings and doctrines, and was held in trust for the preaching and extending of the principles of faith and doctrines of the Cumberland Presbyterian Church and for no other purpose, and that to perfect such reunion would be a breach of the trust aforesaid.

The bill prayed that the said action of the general assembly might be declared unconstitutional, *ultra vires* and void, and an injunction be awarded to prevent the consummation of such union with the Presbyterian Church of the United States of America.

E. B. GREEN, WILLIAM REISTER, JOE H. FUSSELL,  
J. J. McCLELLAN and THEO. G. RISLEY, for appellants;  
W. A. CALDWELL, of counsel.

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JOHN M. GAUT, HUGH CREA, HUGH W. HOUSUM,  
HAMILTON PARKS and JOHN H. DEWITT, for appellees.

MR. PRESIDING JUSTICE RAMSAY delivered the opinion of the court.

Whether or not the confession of faith of the Cumberland Presbyterian Church and the confession of faith of the Presbyterian Church of the United States of America as modified by its declaratory statement of 1903, are identical, or in substance the same, is a question solely for the ecclesiastical courts to determine. This court should not attempt to place any construction upon the meaning of the two confessions of faith, or either of them, or compare one with the other. The civil courts of America assume no right or power to settle disputes upon religious or ecclesiastical subjects, but follow the construction which the church courts put upon such matters. In *Ferraria et al. v. Vasconcelles et al.*, 23 Ill. 403-408, the court say that those who have submitted a matter of membership to an ecclesiastical power cannot invoke the supervisory power of the civil courts.

In *Chase v. Cheney*, 58 Ill. 509, where a minister was charged with omitting alleged material words in his ministration of the sacrament, it was held that the secular courts would not inquire whether the omission was an offense. That was a question for the ecclesiastical court; the civil court was no forum for such an adjudication.

In *Brundage v. Deardorf*, 92 Fed. Rep. 214, it was held that decisions upon ecclesiastical questions of the supreme judicatory in a religious body similar to that of the Cumberland Presbyterian Church were binding and conclusive on members and could not be reviewed in a civil court.

In *Watson v. Jones*, 13 Wallace, 679, the court say that under our system of jurisprudence in the United States, whenever a question of faith or ecclesiastical

rule of law has been decided by the highest court judicatory, such decision must be final and binding upon the civil courts and that such view is supported by the preponderating weight of the authorities.

Upon this particular feature of the controversy the latter case seems to have been cited approvingly by many different courts.

In *Lamb v. Cain*, 129 Ind. 486, it was held that where a civil right depended upon a matter pertaining to an ecclesiastical affair the civil tribunal tries the right and nothing more, taking the ecclesiastical decisions, out of which the civil right arises, as it finds them and accepts such decisions as matters adjudicated by another legally constituted jurisdiction. In this case the general conference of the church had resolved that a constitution and a confession of faith had been legally adopted (although the sufficiency of the vote was challenged) and the civil court held that the decision of the conference was binding and conclusive upon the civil court.

In the case at bar the general assembly of the Cumberland Presbyterian Church in effect determined that the confession of faith of the Presbyterian Church of the United States of America, as modified by the declaratory statement of 1903, was so far like that of the Cumberland Presbyterian Church that it was the duty of the two churches to reunite; that the two churches were of substantially similar faith. Under the authorities we are bound by the decisions of the general assembly of the Cumberland Presbyterian Church, the highest court in that church, to the effect that there is such an agreement between the systems of doctrine contained or stated in the confessions of faith of the two churches since the declaratory statement of 1903, as to warrant the union proposed.

Appellants contend, however, that even if the general assembly had power to determine all matters of doctrine or faith, yet its action looking toward such a

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reunion was wholly unconstitutional, *ultra vires* and void. Appellees argue that the action taken was fully warranted by the constitution and further contend that the general assembly had inherent, as well as the constitutional right, to consummate the union. Upon the case as presented by the bill we hold that the general assembly had authority to provide for and establish a union (or reunion, as it is often called in the bill and arguments) of the Cumberland Presbyterian Church with the Presbyterian Church of the United States of America. Section 40 of the constitution of the Cumberland Presbyterian Church makes its general assembly the highest court in the church, and section 43 of such constitution gives such assembly power to concert measures for promoting the prosperity and enlargement of the church; to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine of the Cumberland Presbyterian Church, and to superintend the affairs of the whole church as well as power to decide all controversies respecting doctrine.

The effect of such sections is to make the general assembly, not only a legislative and administrative body, but one with judicial powers upon ecclesiastical questions, as well. It represents in one body all the particular churches in the Cumberland Presbyterian Church organization and constitutes one bond of union. Why is it not possible to promote the prosperity and enlargement of the church by uniting with another body that teaches a doctrine or faith identical with its own? If these two churches, in their confessions of faith and their religious teachings, are the same, then these interests may be promoted by uniting all those who preach, teach and believe in and care for those interests, the same as can be done by individuals joining their interests in co-partnerships or corporations. United action is productive of more good than divided action under the circumstances. The general assem-

bly has power to receive under its jurisdiction other ecclesiastical bodies of the same faith. This clause must be read with the clause that directs the taking of measures to promote and enlarge the church, and in our judgment the church is enlarged, and its prosperity made more sure by receiving the support of a stronger sister church. If a smaller church can be received, surely affiliation and union can be made with a stronger sister church, if thereby the church, as a religious body, is prospered and enlarged.

That many such unions have been formed among Presbyterian Church bodies, upon the faith of an implied or inherent power to do so, cannot be successfully denied.

In 1785 the synods of New York and Philadelphia took steps for the organization of a general assembly with the view to the union of all the presbyterian bodies into one, and in 1789 resolved such synods into a general assembly. In 1801, after having failed in efforts to unite with both the Reformed Dutch and the Associated-Reformed Churches, the general assembly so organized agreed upon a plan of union with the general association of Connecticut. This action seems to have been taken upon the faith of an inherent power to so act. It was from the organization so formed that the founders of the Cumberland Presbyterian Church, in 1810, withdrew because of a doctrinal difference, and took such action that the organization of the Cumberland Presbyterian Church followed.

Many kindred unions have been formed in like manner, between similar bodies, not only in the United States, but in Canada as well, and upon no different authority. Among them may be mentioned the union of the Associate Reform Church with the Associate Church in 1858, forming the United Presbyterian Church. The Independent Presbyterian Church of the Carolinas with the general assembly of the Presbyterian

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Church (South) in 1863. The Old School Presbyterian Church with the New School in 1870. The Alabama Presbyteries of the Associated Reform Church with the Presbyterian Church (South) in 1867.

The general assembly of the Cumberland Presbyterian Church, when once created, had the same implied power and authority in that church that its kindred assembly had in the Presbyterian Church of the United States of America. That such general assemblies and like bodies have an implied power to unite with others of the same faith or teaching seems to be supported by the authorities and to spring from the very nature of the case.

In McGinnis et al. v. Watson et al., 41 Pa. State, 9, where a majority of a congregation, and the presbytery to which it belonged, approved of a union with the Associate Reform Synod, but a minority disapproved and claimed the church building because of their adherence to the opinions and principles of the original church, it was held that as authority to legislate upon doctrine was one of the powers of the body voting by majority vote to form the union, the act of union was not irregular.

In Ramsey's Appeal, 88 Pa. State, 60, in a case where it was voted by a majority to form a union with another body holding substantially the same doctrines, it was held not to be irregular.

In Central University of Kentucky v. Walters, Executrices, (Ky.) 90 S. W. Rep. 1066, where because of a local sentiment a school was endowed to be located at Richmond, Kentucky, and afterward it was consolidated with the Center College at Danville, Kentucky, and the school at Richmond abandoned, upon a suit brought to cancel a part of the endowment made to the Richmond School, it was held that the consolidation did not annul the endowment.

As has been already intimated the very nature of the case suggests an inherent power in the general

assembly to consummate the reunion sought to be enjoined, if such act will, in the judgment of such assembly, tend to the general advancement, growth and prosperity of the united church. There is no such thing as a popular vote in either the Cumberland Presbyterian Church or the Presbyterian Church of the United States of America. The constitution itself, quoted from, was first made an organic law and promulgated by the general assembly, and not by a vote of the church membership. The supreme power of the association is in its general assembly and its authority to act for the whole church has remained undisputed and unquestioned for many years.

Appellants in their protest against reunion say that: "There is no constitutional provision for the dissolution of our church or merging it into a communion having and holding different doctrines. It is only expressly provided to receive into our communion other ecclesiastical bodies whose doctrine and system of government conform to ours," and "That said basis of union was acted upon by the general assembly and the presbyteries under the representation that the so-called revision of the confession of faith of the Presbyterian Church of the United States of America had materially changed the system of doctrine contained in the confession of faith of said Presbyterian Church of the United States of America before such reunion, whereas, in truth and in fact, the revision of the confession of faith effected in 1903 by the Presbyterian Church of the United States of America has not impaired the integrity of the system of doctrine contained in the confession, but was designed to remove misapprehensions as to the proper interpretation thereof."

The statements quoted suggest very strongly that, in the minds of those in protest, the only obstacle in the way of the proposed reunion was the alleged doctrinal differences. Suppose in the case at bar appellants

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should admit in the record that the confessions of faith in the two church bodies were identically the same, would there still be opposition to the reunion upon constitutional or any other grounds? Would not such an admission take from the argument of appellants all its force and vitality? This doctrinal question or matter of creeds has been adjudicated by the highest ecclesiastical court having jurisdiction, and a determination thereof made to the effect that the creeds are in harmony, and by such adjudication this court is bound as fully as though all doctrinal differences were admitted by answer no longer to exist. The cause of the separation from the parent body by the Cumberland Presbyterian Church having been declared by the highest judicatory in the latter, to have passed away and the difference in creeds no longer to exist, there remains in our judgment no legal barrier to the reunion. There may now be one church with common judicatories, instead of two preaching the same faith and having organizations differing in name alone.

We see no ground for the contention made by appellants to the effect that a special trust concerning church or school property, the result of gifts, conveyances, or devises, etc., will be violated by the consummation of the proposed union of the two associations. Clause six of the concurrent declarations which the two general assemblies agree to adopt upon such consummation and upon which the general assembly of the Cumberland Presbyterian Church contemplates the reunion expressly provides that: "The institutions of learning, together with the endowments and other property, real and personal, owned by them, which are now under the control of the Cumberland Presbyterian Church, shall remain in charge of and be controlled by the Board of Trustees, or other managers, respectively now in charge of such institutions, endowments and property, or by their successors sim-

ilarly appointed or elected," etc. This clause seems fully to safeguard the rights of the churches, schools and associations in the use of their separate properties and to enable them to continue in control thereof through appointments or elections conducted as heretofore. As we read the bill there is no allegation therein setting up any condition expressed in any deed, gift, or devise that would be violated by the consummation of the reunion. In order that the purpose of a donor or grantor may operate to prevent the consummation of the proposed reunion it would have to amount to an expressed condition imposing a restriction or limitation upon the grant. This is, in effect, the holding in *Downen v. Rayburn*, 214 Ill. 342. *Central University of Kentucky v. Walters, Executrices, (Ky.) 90 S. W. Rep. 1066-1070.*

The demurrer to the bill was properly sustained, and the decree of the court dismissing such bill is affirmed.

*Affirmed.*

CASES  
DETERMINED IN THE  
FIRST DISTRICT  
OF THE  
APPELLATE COURTS OF ILLINOIS  
DURING THE YEAR 1907.

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L. Schindler v. James Edwards et al.

Gen No. 18,780.

MUNICIPAL COURT—when Appellate Court without jurisdiction of writ of error sued out to review. To review cases known under the Municipal Court Act as cases of the fourth class, writs of error must be sued out within thirty days after the entry of the final order or judgment complained of.

Application for supersedeas. Error to the Municipal Court of the city of Chicago; the Hon. JOHN HUME, Judge, presiding. Heard in this court at the March term, 1907. Dismissed. Opinion filed June 12, 1907.

WHITFIELD & WHITFIELD, for plaintiff in error.

No appearance for defendants in error.

PER CURIAM. The writ of error in this case is dismissed. It was sued out in the teeth of the statute, known as the Municipal Court Act, approved May 18, 1905, and in force after adoption by the legal voters of Chicago on November 7, 1905.

Section 23 of that Act, in speaking of cases of the fourth and fifth classes, previously described in the Act, provides that the time within which a writ of error may be sued out in any such case shall be limited

to thirty days after the entry of the final order or judgment complained of.

The cause involved here was of the "fourth class," as described in section 2 of the Act. The final judgment in the Municipal Court was on the 23rd day of April, 1907, as appears from the transcript of the record before us.

The writ of error was sued out on June 11, 1907—forty-nine days thereafter. We are without jurisdiction to consider the cause.

It is no matter of regret, however, as an inspection of the transcript has satisfied us that were the cause properly before us, we should refuse the *supersedeas* on the merits.

*Writ of error dismissed.*

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### Josiah W. May v. Mary E. May.

Gen. No. 18,150.

**ALIMONY**—when bill to enforce decree for, does not lie. A bill to enforce a decree for alimony awarded upon the entry of a decree of divorce, does not lie where the issue between the parties to such decree is that since the entry thereof a common law marriage has been contracted between them. The court entering the decree for alimony has full power and jurisdiction to determine such issue and enforce such decree.

Bill for injunction, etc. Error to the Superior Court of Cook county; the Hon. WILLARD M. McEWEN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Reversed and remanded with directions. Opinion filed June 14, 1907.

**Statement by the Court.** Defendant in error, hereinafter called complainant, filed a bill of complaint in the Superior Court alleging that she married plaintiff in error, hereinafter called the defendant, in 1887; that November 16, 1900, she filed a bill for divorce in the Circuit Court of Cook county, subsequently

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amended in which she charged defendant with extreme and repeated cruelty; that May 7, 1902, a decree was entered in her favor, granting her a divorce, giving her the care and custody of the children and the sum of \$8.00 a week permanent alimony.

She alleges that afterward defendant evinced a disposition to reform and a desire to return and live with her and she was induced and led to believe that no valid decree of divorce had in fact and law been granted; that theretofore she allowed defendant to return and live with her in pursuance of said marriage and from January 1, 1903, to September 15, 1905, they continued to live together; that on or about the date last mentioned he deserted her without reasonable cause, having been again guilty of extreme and repeated cruelty; that after such desertion she learned on consultation with her solicitor that a valid decree of divorce had been entered May 7, 1902, which was the first intimation she had received to the effect that defendant's statements to her in that regard were false. She alleges that defendant insists that by reason of their having lived together since said decree of divorce was entered, a common law marriage was contracted and established between them, although no marriage contract was entered into and no ceremony performed and complainant never attempted or intended to enter into any form of contract or marriage subsequent to said decree.

The prayer of the bill is that the court may determine whether a lawful marriage exists, that if it does it may be dissolved, for the care and custody of the children and that defendant be decreed to pay temporary alimony and solicitor's fees, also permanent alimony for the support of complainant and their children, and that an injunction issue restraining defendant from molesting or interfering with complainant or the children and for general relief.

Defendant answered denying the representations al-

leged to have been made by him, admitting that the two lived together from January 1, 1903, until September 15, 1905, denies he wrongfully deserted complainant on the last mentioned date, but avers that he left because of improper conduct on the part of complainant. Defendant denies the charges of cruelty, and that he claims the existence of a common law marriage, admits that no formal marriage contract was entered into subsequent to May 7, 1902, and refers to a petition filed by him in the Circuit Court in the original divorce suit, in which petition he sets out the alleged circumstances of the original separation, that he did not know the divorce decree of May 7, 1902, nor any order directing him to pay alimony had been entered until after he left complainant in September, 1905, and prays for the vacation of orders entered for alimony and solicitor's fees, the custody and control of the minor children and for restitution by complainant.

The decree finds that no marriage relation exists between the parties and that the decree of divorce entered in the Circuit Court May 7, 1902, still remains in full force and that complainant is now entitled to its enforcement in all respects. It then proceeds to find that defendant has not paid the alimony which by that decree he was directed to pay, that there is due from him \$164.55, and orders him to abide by that decree of the Circuit Court entered May 7, 1902, pay the alimony so found to be due and also pay the permanent alimony provided by said decree, and provides that payments of alimony so made shall *ipso facto* operate as compliance with said former decree of the Circuit Court. The alimony provided for is decreed a lien on the real estate and personal property of defendant.

JOHN W. CREEKMUR and RUFUS COPE, for plaintiff in error.

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May v. May.

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ROSENTHAL & HAMILL, LEE J. FRANK and CHARLES H. PEASE, for defendant in error.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

We discover nothing in this record to justify the Superior Court in undertaking to enforce the decree entered May 7, 1902, by the Circuit Court. Having found there was no common law or other contract of marriage since the entry of that decree divorcing the parties and granting alimony to the complainant, the jurisdiction of the Superior Court under the bill in the present case terminated. That bill prays the court to "determine whether a lawful marriage exists," and if the court finds such marriage does exist, then for its dissolution, for alimony and "such further relief as equity may require." When the Superior Court found that no marriage existed there was no occasion nor was there jurisdiction under the prayer to grant further relief and none was asked for. There was no occasion to attempt to enforce the provisions of the decree of the Circuit Court as to alimony. That court had and has ample power and jurisdiction to enforce its own decrees.

It is true that a bill in equity may be maintained to enforce a decree "where the rights of the parties have become so embarrassed by subsequent events, that no ordinary process of the court upon the first decree will serve, and it is therefore necessary to have another decree of the court to ascertain and enforce them." *Oberein v. Wells*, 163 Ill. 101. There was here no embarrassment of that kind. When it appeared that nothing had transpired since the original decree of divorce which had changed the status of the parties under that decree, that they had not been remarried and that the original decree of divorce with all its provisions as to custody of the children and alimony was in full force and effect, the present bill might properly have been dismissed, since

the alternative relief prayed for could not be granted under the bill. If the Circuit Court was itself for any reason unable to enforce its own decree, then under a bill containing proper averments a court of equity having jurisdiction might do so. Such was the case of *Barber v. Barber*, 21 How. (U. S.) 582, cited by complainant's counsel. No such case is presented by the bill under consideration. As a bill to review a decree the Superior Court was without jurisdiction to entertain it. Such bill must be filed in the court where the decree sought to be reviewed was rendered, and the Superior Court has no jurisdiction to review a decree of the Circuit Court and *vice versa*.

The decree of the Superior Court will be reversed and the cause remanded with directions to dismiss the bill.

*Reversed and remanded with directions.*

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**The People of the State of Illinois ex rel., etc., v. Mrs.  
A. L. Kelley.**

**Gen. No. 18,159.**

1. **OFFICIAL STENOGRAFHER—*by whom appointment may be made.*** The appointment of an official stenographer may be made by the several judges of the circuit courts for their respective courts.

2. **OFFICIAL STENOGRAFHER—*effect of death of appointing judge upon term of.*** The death of the judge who appointed an official stenographer does not *ipso facto* terminate his employment.

**Quo warranto.** Appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. **Affirmed.** Opinion filed June 14, 1907.

**J. L. BENNETT, for appellant.**

**KREMER & GREENFIELD, for appellee.**

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The People v. Kelly.

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MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Leave was given the petitioner in this case to file an information in the nature of a *quo warranto*, seeking to oust appellee from the position of official reporter for the Circuit Court of Cook county which she holds by virtue of an appointment made by the late Judge Murray F. Tuley, deceased, then of that court. The appointment was made by an order entered of record July 8, 1903, "for a term ending the first day of June, 1909, to hold her office during the pleasure of the judge appointing her as provided by said statute." The first section of the Act referred to (R. S. chap. 37, sec. 82a) is as follows:

"That the several judges of the Circuit Courts in this state be and they are hereby authorized to appoint a shorthand reporter for their respective courts, whose duty shall be as hereinafter specified. The reporter so appointed shall hold his position during the pleasure of the judges appointing him; not, however, extending beyond the time the judges making such appointment shall be elected for. Provided, however, that in case of the absence or disability of the reporter so appointed the presiding judge may appoint any other reporter to act in his place during such absence or disability."

The Superior Court sustained a demurrer filed by the respondent to the replication to the respondent's plea, and appellant electing to stand by the demurrer, judgment was entered in favor of the respondent, which is assigned as error.

It is urged in behalf of appellant that the appointment of an official reporter under the statute is purely a ministerial act, that the appointment is by the individual judge and in no sense the action of the court, and that the authority to hold the office ceases when the judge dies or ceases to hold his office. The plea of the defendant set up the order of appointment which purports to have been made by Judge Tuley,

sitting as a judge of the Circuit Court. Such an appointment may not be a judicial as distinguished from a ministerial act, but the power to make it conferred by statute is certainly not incompatible with the judicial office. *The People v. Nelson*, 133 Ill. 565-601. Its exact nature in this respect is not material in the present case, nor do we deem it material whether the order be regarded as made by Judge Tuley, or as an order of court. The only question is whether the appointment is still in force, Judge Tuley, by whom or at whose instance it was made, having since died. The obvious meaning of the statutory provision above quoted is that the term of the reporters so appointed while terminable at any time by the judges appointing them shall in no event extend beyond the term of office of such judges. It does not follow, however, that the reporter's appointment terminates with the death before the expiration of his official term of the judge by whose order he was appointed, merely because the judge so appointing can no longer exercise at his pleasure the power of removal. The continued employment of the reporter by other judges of the same court after such death, may be considered in the nature of a recognition and affirmation of such appointment by such judges. The appointments by force of the statute are made "for their respective courts," not for the individual judge who enters the order, but for the court over a branch of which he presides. A successor of the deceased judge may, we think, properly and lawfully exercise the power of removal if he deems proper. If the language of the statute be construed to mean that such appointments are made by "the several judges," although on the order of one of them, then it would seem they may be revoked at the pleasure of the same judges, exercised in the manner in which the appointments are made.

Respondent has continued to perform services for the judges of the Circuit Court by whom her bills

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have been duly certified, and we are of opinion her appointment is still in force.

The judgment of the Superior Court will be affirmed.

*Affirmed.*

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**James A. Patten v. L. M. Willis et al.**

Gen. No. 18,178.

REAL ESTATE BROKER—*who entitled to commissions as between two adverse claimants.* It is not the broker who first speaks of the property, but he who is the procuring cause of the sale, be he the first or second to engage the attention of the purchaser, who is entitled to the commissions.

Assumpsit. Appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Reversed, with finding of facts. Opinion filed June 14, 1907.

**Statement by the Court.** This is a suit brought by appellees to recover commissions for alleged services rendered as real estate brokers in securing a tenant for certain portions of a building owned by appellant. The amended bill of particulars filed by appellees states the demand as follows:

"To commission at rate fixed by Real Estate Board and being the usual and customary charges in the city of Chicago (being 5% of first year's rental for first two years, and 1% of first year's rental for each additional year) for having opened up and undertaken negotiations on behalf and at the express instance of defendant with the Faithorn Printing Company, with the view of securing said Printing Company as a tenant for certain floors of the building known as numbers 66 to 74, both inclusive, Sherman street, Chicago, Illinois, owned by the defendant, which negotiations were thereafter taken in hand by the defendant executing and entering into a lease with said

Printing Company of said premises, said lease commencing, to-wit, January 1, 1904, and running to April 30, 1909, being five years at \$9,500 per year, \$760."

The issues were submitted to a jury which returned a verdict assessing damages against the defendant at the sum demanded \$760. Judgment was rendered on the verdict and defendant appeals.

JOSEPH E. PADEN and OSCAR A. KROPP, for appellant.

MOSES, ROSENTHAL & KENNEDY, for appellees.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

It is insisted in behalf of appellant that there is no evidence upon which the verdict and judgment may be sustained and the court erred therefore in denying appellant's motion to instruct the jury to find the issues in favor of the defendant. In support of this contention appellant's attorneys cite *Pratt v. Hotchkiss*, 10 Ill. App. 603-605, in which the rule is stated to be "that a broker before he is entitled to commissions must furnish a purchaser who is ready, willing and able to complete the purchase on the terms proposed;" and it is insisted that appellees have failed to prove essential facts necessary to entitle them to recover, viz.: (1) that they had been employed by the appellant to lease the premises upon any certain terms, or (2) that they procured a party who was ready, willing and able to enter into a lease with appellant on terms proposed. See also *Metzen v. Wyatt*, 41 Ill. App. 487; *Parmly v. Farrar*, 169 Ill. 606; *Lawrence v. Rhodes*, 188 Ill. 96.

Appellees' attorneys state that their case rests principally on the testimony of appellee Willis who conducted the alleged negotiations, and that he testified in substance as follows: "I called upon Mr.

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Patten and asked him if he would consider a proposition to erect a building on either one of the pieces of property which he had recently acquired on Sherman street, preferably the one further north. He said he had bought the property for the purpose of improving it, and that he was anxious to have tenants. I asked him if he would erect a building to contain forty or fifty thousand feet, inasmuch as that would be about the space the Faithorn people would require. He said that he would prefer to improve the entire lot, which would give a building considerably larger than that, and wanted to know if they would not take the whole building. I told him I would see our parties and advise him later. I left him and went to the Faithorn Printing Company. I said to them that Mr. Patten preferred to improve the entire property, and asked if they would take the whole building and sublet the balance they did not wish for their own business. Mr. Koss said that they would prefer to have a building for themselves alone and would not care to take the entire proposition. I went back to Mr. Patten and made that report, and he said, 'Very well, that he would improve the whole property, operating the building himself and give them such space as they would require.' We reported that to the Faithorn Printing Company and they said they would like to have the plans and specifications. I went back to Mr. Patten and asked him if we could have a plan of the proposed building, and he said he would have his architect give him a plan, and if I would come back by a certain date (which he set probably ten days in advance) he would have it in readiness for me. I called back in accordance with that, and the plan was ready, and Mr. Patten was there and gave it to me. At the time he handed the plan to me he asked me who the people were. I told him it was the Faithorn Printing Company. He said he knew of them. He was not personally acquainted with them; he said he knew

of them and knew they were a reputable house and desirable tenants. The plan was taken immediately over to the Faithorn Printing Company and I saw their manager, Mr. Koss, and he asked if he might keep it for a few days to look it over carefully and until Mr. Faithorn returned to the city. We said that would be entirely satisfactory, and left the plan there. I called upon Mr. Patten and I said the parties were practically agreed and we wanted to get the principals together."

On cross-examination appellee Willis was asked if when he first called on appellant he "did not first state to him after handing him your card and introducing yourself that you had a client who desired to have a building erected on his property for his own exclusive use?" To which the witness replied, "That was the nature of my business there and very likely I said it, although I don't remember that I said it exactly that way."

It is claimed in behalf of appellees to be clear from this testimony "that Mr. Patten accepted the services of a real estate agent in procuring a tenant for the premises he was about to construct," that he allowed the agent to conduct negotiations, so being able to ascertain who the tenant was. We do not so understand the evidence. It clearly appears from this witness' testimony that he went to appellant representing a "client" so-called, a party who desired to have a building erected for his own exclusive use. By his own testimony appellee Willis, in behalf of himself and his partner, was acting for and in the interests of such client of his own. In the subsequent negotiations he continued acting for this client, in the endeavor to get appellant to erect a building to contain forty or fifty thousand feet for the use of the client. He was told that appellant did not wish to erect such a building but one considerably larger to cover the entire lot, and was asked if his party would take the whole

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of such larger building and “sublet what they did not wish for their own business.” His client refused to accept such proposition, and it was dropped. Acting still for this client of his own, the said appellee informed his client that appellant proposed to build and operate himself a building on the premises he had acquired and was told by the client the latter would like to see the plans of the proposed building. These appellee Willis procured from appellant, to whom the witness at appellant’s request gave the name of the client for whom he was acting. Appellee delivered the plans to his client and left them there. He then states that he called on appellant and told him the parties were practically agreed, and “we wanted to get the principals together.” Conceding all that the witness states, it in effect tends to show nothing more, so far as we can discover, than that he was acting entirely for and in behalf of his said “client,” the Faithorn Printing Company. His testimony shows no employment by appellant whatever, no lease effected, nothing accomplished entitling him to a commission from anyone, no terms of leasing accepted or even proposed by appellant or himself. As substantially said in *Mears v. Stone*, 44 Ill. App. 444-448, appellees did not by the beginning of negotiations with appellant terminating in the latter’s refusal to erect a building for the use of the printing company “acquire a lien upon any disposition he might thereafter come into to” lease a portion of a larger building appellant might thereafter erect. “A broker is never entitled to his commissions for unsuccessful efforts” even from the party for whom he is acting. Appellee was not acting for appellant in the case at bar. His own testimony shows that said appellee had been approached by the Faithorn Printing Company with reference to the erection of a building for that company on a piece of property belonging to another party, not appellant. He afterward went to appell-

lant because he saw in a newspaper that appellant had purchased this vacant real estate through other agents.

It is claimed, however, that there was an acceptance and ratification of the alleged services of appellees and consequently an implied contract of employment, inasmuch as the Faithorn Printing Company did subsequently rent from appellant a portion of the building which he erected. Appellant testifies that when appellee Willis first called upon him appellant advised him that Oliver & Scott were appellant's real estate agents in charge of his business. In this appellant is corroborated by his clerk's testimony, and that the agents named were appellant's agents is not disputed. While it is true that the printing company did afterward become tenants of appellant, the evidence is clear, we think, that this was not due to anything done or said by appellees. The latter called as a witness the manager of that company, who testified that seeing the appellees' sign on property of a third party north of Van Buren street, Chicago, and a statement thereon, "Will build to suit tenant," and having in mind that the company was looking for a building for its own occupancy exclusively, he called on appellee Willis who said "he would see his client" and did so. The witness says he never discussed with Willis any arrangement relating to appellant other "than a building for our exclusive use. He never mentioned to me that he would like to have us for tenants of the proposed building of Mr. Patten for floor space. No question of floor space was discussed with Mr. Willis." This manager of the printing company testifies explicitly that when Willis told him he would go and see if he could get appellant to divide the building and build half a building for the company, the witness "told him that would be too much space for our use and the matter was dropped." The manager further states that prior to the time he saw appellee

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Willis, Mr. Oliver, the real estate agent through whom the printing company was finally induced to become a tenant of appellant, had called on the witness with regard to another building, a proposition the company did not entertain, and he states that "Oliver had been negotiating with me as a possible tenant for Mr. Patten's property \* \* \* on which he proposed to erect a building, a long time before I saw Mr. Willis." He testifies that when "Oliver could not get us in there (other property of appellant's) he tried to get us in this building and finally did get us in. It took him a good while to do it, because we wanted a building for our own exclusive use. That was what we had in mind." This evidence is undisputed and tends to show that Oliver was not only first in point of time in negotiating with the printing company to become tenants of appellant, but that he was constantly pursuing such negotiations in appellant's behalf until he finally succeeded in procuring the printing company as tenants on the premises in question. In *Fessenden v. Doane*, 188 Ill. 228-231, it is said: "One claiming commission for the sale of real estate cannot rightfully claim the benefit of introducing to the defendant a purchaser for the property who had already been introduced to him as such by another party, with and through whom negotiations were already in progress and were continued to a consummation of the sale."

In view therefore of the testimony in behalf of appellees, including that of appellee Willis himself, as well as that in behalf of appellant, we deem it clear that appellees are not entitled to recover in this case. They did not find the tenant for appellant in the first place nor introduce him to appellant's notice, nor did they effect the lease upon which they now seek to recover commissions. What is said in *McGuire v. Carlson*, 61 Ill. App. 295, is in point except that the evidence in the present case does not support the claim

of appellees that appellant ever employed appellees at all. The court says:

"Unless he specially agrees not to do so, an owner may employ two or more brokers. In such case it is the broker who is the efficient cause of the sale who is entitled to commissions, and this right is not affected by the fact that such broker sells to one whose attention to the property had before been called by another broker. It is not the broker who first speaks of the property, but he who is the procuring cause of the sale, be he the first or second to engage the attention of the purchaser. Mechem on Agency, section 969; Vreeland v. Vetterlein, 33 N. J. L. 247; Sibbald v. The Bethlehem Iron Co., 83 N. Y. 378.

The party selling, where several brokers have been employed, may, in the absence of all collusion on his part pay to the agent through whose instrumentality the sale was brought about, without inquiry as to whether some other broker may not have had something to do with effecting the sale."

For the reasons indicated the judgment of the Superior Court will be reversed with a finding of facts.

*Reversed with finding of facts.*

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### Rebecca McKeag v. John C. Pirie, Receiver.

Gen. No. 18,189.

1. **FORCIBLE DETAINER—*by whom complaint in, may be signed.***  
A complaint in forcible detainer may be signed by the receiver of the owner, especially where the lease sought to be terminated was itself executed by the receiver.

2. **RECEIVER—*right of, to maintain action of forcible detainer.***  
A receiver of a homestead loan association has power to institute and maintain an action of forcible detainer without specific authorization by the appointing court.

Action commenced before justice of the peace. Appeal from the County Court of Cook county; the Hon. J. D. WELSH, Judge, presid-

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ing. Heard in the Branch Appellate Court at the October term, 1906. Affirmed. Opinion filed June 14, 1907.

WILLIAM SCHWEMM, for appellant.

CHARLES L. MAHONY, for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from a judgment in a forcible entry and detainer suit, adjudging appellee entitled to the possession of premises in controversy. Judgment was first entered by a justice of the peace. Appellant appealed to the County Court and from the judgment of that court brings the case here.

Her attorney states his contentions to be that the complaint should have been signed in the name of the corporation for which appellee is receiver by which, it is said, the lease was executed, that there is no testimony showing the receiver's appointment and authority to prosecute this action, and that appellee failed to show defendant to be in possession of the premises, and so cannot recover. The record shows no evidence whatever introduced in behalf of appellant, and it is not pretended she has any meritorious defense.

As to the first of said contentions it appears from appellant's abstract that the lease was executed by appellee as receiver of the Curran Mutual Aid & Building Association. No ground of objection to the receiver's signing the complaint as such receiver is even stated. As to the second contention that there is no evidence tending to show appellee's appointment as receiver for the Curran Mutual Aid & Building Association, the lease itself signed by appellant and by appellee as such receiver may be deemed sufficient *prima facie* evidence of such appointment as against appellant who recognized his authority as such receiver by signing and accepting the lease of the prem-

ises in question from him in that capacity. The right of the receiver to maintain the action is, we think, conferred by the statute (R. S. chap. 32, sec. 127), which provides that courts of equity shall have full power to appoint receivers for associations of the character of that here in question "who shall have authority by the name of the receiver of such association (giving the name) to sue in all courts," etc. This provision is framed substantially in the language of section 25 of the Corporation Act. In Peabody v. New England Water Works Co., 80 Ill. App. 458-460, that section is held not to authorize a receiver to sue or defend suits unless he shows express authority to prosecute the action. The holding in this regard is by a divided court and contrary to Hanke v. Blattner, 34 Ill. App. 394, in which it was held that by virtue of section 25 of the Corporation Act a receiver might sue without an order of court authorizing him to bring suit. We are of opinion that section 127 under consideration in this case authorizes the receiver to sue and make it unnecessary for him to prove affirmatively that he has been expressly "commanded by the decree of court" to bring the action in the individual case. Those words apply, we think, not to the authority to sue, but to closing up the affairs of the association or making "the money charged against it" and restoring it to the shareholders.

There is sufficient evidence tending to show *prima facie* that appellant is in possession of the premises and that "several hundred dollars" is due for rent.

The judgment of the County Court will be affirmed.

*Affirmed.*

**James B. Nelson v. Francis Beidler & Company.**

Gen. No. 18,185.

1. **ABSTRACT**—when insufficient to present errors relied upon. An abstract which does not purport to set out any of the contents of the bill of exceptions does not present errors assigned upon rulings with respect to matters other than pleadings.

2. **SHORT CAUSE CALENDAR**—when notice filed within two days after service. A notice served on the 18th and filed on the 21st, is, under the law, filed within two days after service.

3. **SIMILITER**—effect of failure to add. The failure to add a *similiter* to a plea of *non assumpsit* is a mere formal defect which is waived by proceeding to trial.

**Assumpsit.** Appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Affirmed with damages. Opinion filed June 14, 1907.

**ALFRED F. TOMPKINS**, for appellant.

**NEWMAN, NORTHRUP, LEVINSON & BECKER**, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the defendant from a judgment for \$526.35 recovered against him in the Superior Court upon his promissory note for \$500, in an action brought by the payee of said note. The grounds of reversal urged are: first, that the notice given by the plaintiff to place the cause on the short cause calendar was not filed with the clerk within two days after service thereof, as required by the rule of the Superior Court, and, second, that the cause was not at issue at the time the cause was placed on the short cause calendar, because no *similiter* had been added to defendant's plea of *non-assumpsit*, and the rules of the Superior Court provide that no case shall be placed on the short cause calendar until the same is at issue.

The abstract shows that a bill of exceptions was "signed and sealed by the trial court," but does not purport to set out any part of the contents thereof. The abstract therefore is not sufficient to present either of the errors relied upon, and for that reason the judgment must be affirmed.

We have, however, examined the record in order to dispose of the contention of appellee that the appeal was taken for delay, and that damages for such delay should be allowed. The notice was served Friday, May 18, 1906. It was filed in the clerk's office Monday, May 21. Under the statutory computation of time this was a compliance with the rule of court.

"The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Sunday, and then it shall also be excluded." R. S. ch. 131, sec. 1, clause 11.

The adding of the *similiter* to the plea of *non-assumpsit* was but the merest formality. It might have been added by the defendant, and the trial court properly treated the cause as if the *similiter* had been added and the cause formally put at issue. Highley v. Metzger, 186 Ill. 253; Hefling v. Vanzandt, 162 *id.* 162.

We think that the appeal was taken only for delay, and the judgment will be affirmed with five dollars damages.

*Affirmed with damages.*

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#### George Duddleston v. B. A. Eckhart.

Gen. No. 18,174.

1. BILL OF EXCEPTIONS—*how construed*. A bill of exceptions is the pleading of the party who presents it, and is therefore to be construed most strongly against him.

2. JUDGMENT—*what affidavit upon motion to set aside, must set up*. An affidavit presented upon a motion to set aside a judgment entered by default must show a meritorious defense.

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Dudleston v. Eckhart.

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Judgment by confession. Appeal from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1906. Affirmed. Opinion filed June 14, 1907.

P. SHELLY O'RYAN, for appellant.

WEST, ECKHART & TAYLOR, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

This appeal is from an order of the Superior Court denying a motion of appellant to vacate a judgment by confession against him and in favor of appellee, and for leave to plead to the merits of the case.

Appellant was a tenant of appellee under a written lease containing the usual form of power of attorney authorizing confession of judgment for rent due and unpaid. The lease stipulated for a monthly rental of \$225, and the declaration alleged two months rent or \$450 to be due and unpaid. Judgment was taken for \$470, being the amount of rent due and \$20 attorneys' fees.

The motion was supported by the affidavit of appellant and one Preissing and the testimony of appellant received on the hearing of the motion. The affidavit and testimony of appellant tended to show that the premises demised to him are on the street level, and were to be occupied solely for a wholesale and retail meat business; that on or about November 23, 1903, appellee erected or permitted to be erected north of and adjoining said premises an elevated wooden sidewalk or platform of a height of three feet and extending about fifty feet in length and of the entire width of the sidewalk, and that it was placed close to the door of said premises, and it greatly interfered with the ingress and egress therefrom, changing the condition of the premises and depreciating their value for the purposes for which appellant had rented them,

whereby appellant was damaged. It appeared that the term of the lease was for sixty-one months and expired the last of April, 1906; and that appellee is the owner of both premises and that the McNeill & Higgins Company was the tenant of the premises next north of appellant.

The affidavit of Preissing stated that the elevated sidewalk was erected in November, 1903, and that it greatly interfered with the ingress of customers and that appellant's business suffered materially thereby.

Appellant occupied the premises leased to him during the full term covered by the lease, and on leaving the premises refused to pay the rent for the last two months.

The record does not show that appellant at any time or in any manner objected to the erection of the sidewalk or the maintenance thereof, or made any complaint in reference thereto until after the judgment was entered. It may be inferred that appellant paid his rent from November until March without protest.

The only showing in the record tending to connect appellee with the erection of the elevated sidewalk is in the affidavit of appellant which states that "the plaintiff erected or permitted to be erected," etc.

"It is an elementary rule of appellate procedure that he who alleges error in a judgment must show it, and that the bill of exceptions is the pleading of him who presents it, and is therefore to be taken most strongly against the pleader." Jones v. Glathart, 100 Ill. App. 630, 634.

In Crossman v. Wohlleben, 90 Ill. 537, 542, it is said: "In applications to set aside judgments entered by default or entered in *ex parte* proceedings, affidavits in support of such applications are to be construed most strongly against the party making the application.

"It is not sufficient to state facts from which if proved on a trial, a defense might be inferred." See

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also Ch. Fire Proof Co. et al. v. Park Nat. Bank, 145 Ill. 481, 487.

It is apparent that the statement of the affidavit as to the erection of the sidewalk by appellee is only the conclusion of the maker of the affidavit. Testing the affidavit by the rule indicated, it does not make out a meritorious defense to the action. It does not appear that appellee did any specific act or thing or authorized any act with respect to the erection of the sidewalk. It might be inferred from the statement of the affidavit that appellee authorized the erection of the sidewalk or that he himself built it, and that appellant's business was injured, but that is not sufficient. The particular evidentiary facts must be shown, substantially as they should be proven on a trial.

We find no abuse of the discretion of the court shown in its action overruling appellant's motion.

The order of the Superior Court is affirmed.

*Affirmed.*



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